Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-741

HARRY HUNTER,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

The petitioner Harry Hunter respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of North Carolina entered in this proceeding on September 1, 1976.

OPINION BELOW

The judgment and opinion of the Supreme Court of North Carolina is reported in the North Carolina Supreme Court Reports Advance Sheets, Volume 290, No. 4, pages 556 to 586, and is printed in Appendix A hereto attached.

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on September 1, 1976, and adjudges that the Court of first instance, i.e., the Superior Court of Union County, North Carolina, committed no error in the petitioner's trial, conviction, and sentence to life imprisonment. Rule 31(g) of the North Carolina Rules of Appellate Procedure prohibits petitions for rehearing in criminal cases. (North Carolina Supreme Court Reports, Vol. 287, p. 750.) The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(3).

QUESTIONS PRESENTED

1. Whether a North Carolina Court denied the petitioner, a citizen and resident of South Carolina, who was charged with serious felonies in the North Carolina Court, his right under the Sixth and Fourteenth Amendments to have the assistance of counsel for his defense by refusing to permit him to be represented at his trial by a South Carolina attorney in good standing whom he had chosen and retained for that purpose.

2. Whether a North Carolina Court, which had just taken action against the petitioner as indicated by question No. 1, denied the petitioner his right under the Sixth and Fourteenth Amendments to have the assistance of counsel for his defense by refusing to continue the trial of the charges against him to permit him to retain other counsel to replace the excluded counsel and by proceeding forthwith with the trial of the charges.

3. If the answer to these questions or either of them is "Yes", was the action of the North Carolina Court denying him his right to counsel under the Sixth and Fourteenth Amendments rendered harmless error by the

fact that other attorneys actually defended him at his trial.

CONSTITUTIONAL PROVISIONS, STATUTES, AND CANONS OF ETHICS INVOLVED

These constitutional provisions, statutes, and canons of ethics, which are stated in pertinent part in Appendix B, are involved for varying reasons:

1. Article VI of the Constitution of the United States.

2. The Sixth and Fourteenth Amendments to the Constitution of the United States.

3. Section 1-255 of the Code of Laws of South Carolina of 1962.

4. Sections 14-5 and 14-6 of the General Statutes of North Carolina. (Replacement Vol. 1B-1969)

5. Section 14-17 of the General Statutes of North Carolina. (Replacement Vol. 1B-1969)

6. Section 14-87 of the General Statutes of North Carolina. (Replacement Vol. 1B-1969)

7. Section 84-2 of the General Statutes of North Carolina. (Replacement Vol. 2C-1975)

8. Section 84-4.1 of the General Statutes of North Carolina. (Replacement Vol. 2C-1975 and 1975 Supplement)

9. Canon of Ethics No. 46C of the North Carolina State Bar. (General Statutes of North Carolina, Replacement Vol. 4A-1970, pages 437-438)

10. Canon of Ethics No. 9 of the Code of Professional Responsibility of the North Carolina State Bar. (The General Statutes of North Carolina: 1975 Cumulative Supplement to Replacement Vol. 4A, pages 256-257)

HOW FEDERAL QUESTIONS PRESENTED

The petitioner presented the Federal questions set forth above timely and properly in the court of first instance, i.e., the Superior Court of Union County, North Carolina, by immediately excepting to the ruling of the presiding judge denying him the right to be represented at his trial by the attorney chosen and retained by him, to wit, James M. Long (Record, Exception No. 1, p. 23), and the ruling of the presiding judge refusing to continue the trial of the charges against him for the purpose stated (Record, Exception No. 2, p. 23) as set forth in paragraphs Nos. 12, 13, and 14 of the ensuing Statement of Case. The petitioner properly presented these Federal questions on his appeal to the Supreme Court of North Carolina in conformity with its Rules by assigning them as errors in the case and record on appeal (Record, Assignments of Error Nos. 1 and 2, p. 253), as set forth in paragraph No. 19 of the ensuing Statement of Case, and by presenting them to the Supreme Court by the oral argument and brief of his counsel in that Court (Petitioner's Brief in the Supreme Court of North Carolina, pp. 92-99) as also set forth in paragraph No. 19 of the ensuing Statement of Case. Indeed, pages 1 to 10 of the brief filed by the State of North Carolina in the North Carolina Supreme Court and pages 566 and 572 of the judgment of the Supreme Court of North Carolina (which is set forth in Appendix A as well as in North Carolina Supreme Court Advance Sheets Volume 290, No. 4, pages 556 to 586) make it manifest that the petitioner properly and timely presented the Federal questions at all stages of the proceedings in the North Carolina Courts as set forth in paragraphs Nos. 12, 13, 14, 19, 20, and 21 of the ensuing Statement of Case. Copies of the Record, Briefs, and Judgment of the North

Carolina Supreme Court have been certified to the Clerk of this Court by the Clerk of the Supreme Court of North Carolina.

STATEMENT OF CASE

The facts are as follows:

1. The petitioner, Harry Hunter, a citizen and resident of South Carolina, operates a motel at Myrtle Beach, in Horry County, South Carolina, and regularly retains Ralph Stroman, of Conway, Horry County, South Carolina, an attorney regularly admitted to practice in courts of record of South Carolina and in good standing therein, who is rather inexperienced in the practice of criminal law, to advise him in respect to his business affairs. (Record, pp. 21-22)

2. On February 7, 1975, Billy Devine, who was aided and abetted by Gary Allen Watkins and James Earl Locklear, shot and killed William Benjamin Potts at his home in Union County, North Carolina, while attempting to perpetrate a robbery upon him. (Record, pp. 38-87)

3. On or about April 7, 1975, Billy Devine, Gary Allen Watkins, and James Earl Locklear entered pleas of guilty to the second degree murder of William Benjamin Potts in the Superior Court of Union County, North Carolina, a division of the North Carolina General Court of Justice, and each of them was thereupon sentenced to life imprisonment in the North Carolina State Prison. (Record, pp. 65, 77) On that occasion the petitioner, who has always denied any complicity in the slaying of William Benjamin Potts, testified for the prosecution that Billy Devine, Gary Allen Watkins, and James Earl Locklear visited his temporary home in the neighborhood of the home of William Benjamin Potts before and after the slaying. (Record, p. 146)

4. On May 5, 1975, a Grand Jury, which had been empaneled in the Superior Court of Union County, North Carolina, returned two indictments against the petitioner. The first of them charged him with the murder of William Benjamin Potts contrary to the relevant North Carolina Statute, i.e., Section 14-17 of the General Statutes of North Carolina, and the second charged him with committing an armed robbery upon William Benjamin Potts contrary to the relevant North Carolina Statute, i.e., Section 14-87 of the General Statutes of North Carolina. (Record, pp. 4-6)

5. On the return of the two indictments, i.e., on or about May 5, 1975, the petitioner retained James M. Long, of Conway, Horry County. South Carolina, an attorney regularly admitted to practice in courts of record of South Carolina and in good standing therein, to join his regularly retained attorney, Ralph Stroman, in defending him on the trial of the criminal charges embraced within the two indictments which had been returned against him in the Superior Court of Union County, North Carolina. (Record, pp. 21-22)

6. At such time James M. Long, who was highly skilled in the trial of criminal cases, was, and still is, the duly elected and qualified Solicitor, i.e., prosecuting attorney, of the 15th Judicial Circuit of South Carolina, whose courts have jurisdiction of felonies and substantial misdemeanors, i.e., misdemeanors punishable by a fine of more than $100 or by imprisonment for more than 30 days, committed in Horry and Georgetown Counties. (Record, pp. 16-20)

7. Under the law of South Carolina in force at the times involved in this case, i.e., Section 1-255 of the Code of Laws of South Carolina of 1962, (which is set forth in Appendix B hereto attached) it was ethical and lawful for

James M. Long to accept the retainer to defend the petitioner upon the criminal charges pending against him in the Superior Court of Union County, North Carolina, notwithstanding he held the office of Solicitor in the 15th Judicial Circuit of South Carolina. This is true because such solicitorship was not a full-time office in South Carolina, and a South Carolina Solicitor was free to practice law in any case in which the State of South Carolina was not a party. The State of South Carolina was certainly not involved as a party or otherwise in the criminal cases against the petitioner in the Superior Court of Union County, North Carolina. (Record, p. 18; Appendix B)

8. On or about June 1, 1975, the petitioner retained James E. Griffin, of Monroe, Union County, North Carolina, an attorney regularly admitted to practice in courts of record of North Carolina and in good standing therein, to assist his South Carolina attorneys, James M. Long and Ralph Stroman, in defending him on the trial of the criminal charges pending against him in the Superior Court of Union County, North Carolina. (Record, p. 21)

9. Subsequent to the time when James M. Long ethically and lawfully agreed to defend the petitioner upon the indictments returned against him in the Superior Court of Union County, North Carolina, charges were brought against the petitioner in Horry County, South Carolina, alleging that he and Billy Devine and Gary Allen Watkins had committed certain felonies in Horry County, South Carolina, during times preceding the slaying of William Benjamin Potts. (Record, p. 17) Immediately after these charges were made in Horry County, South Carolina, James M. Long disqualified himself to appear in connection with such charges, and

entrusted their prosecution solely to an assistant prosecutor. About this time, the Attorney General of South Carolina applied to Associate Justice Woodrow Lewis of the South Carolina Supreme Court for an order enjoining James M. Long from participating in any way in the Horry County, South Carolina cases involving the petitioner. Upon learning that James M. Long had totally disqualified himself in those cases and that their prosecution had been entrusted solely to an assistant prosecuting attorney, the Attorney General of South Carolina withdrew his application for the restraining order, (Record, p. 18) and the action which had been taken by James M. Long in respect to the Horry County, South Carolina cases was approved by "the proper authorities in South Carolina." (Record, pp. 22-23)

10. When the indictments against the petitioner were called up for trial at the August 18, 1975, criminal session of the Superior Court of Union County, North Carolina, James M. Long and Ralph Stroman, as members in good standing of the South Carolina bar, made motions before the Presiding Superior Court Judge, Julius A. Rousseau, Jr., in strict conformity with the relevant North Carolina statute (i.e., Section 84-4.1 of the General Statutes of North Carolina, which is set forth in Appendix B) to be admitted to practice in the Superior Court of Union County, North Carolina, and the General Court of Justice of North Carolina for the sole and limited purpose of appearing for their client, the petitioner, on the trial of the indictments against him. (Record, pp. 6-7; Appendix A, p. 567; Appendix B)

11. Thereupon Carroll Lowder, the North Carolina District Attorney charged with responsibility for prosecuting criminal cases in the Superior Court of Union County, North Carolina, objected to the motion of James

M. Long and prayed Judge Rousseau to deny to the petitioner the right to be defended by James M. Long, an attorney chosen and retained by him, on the trial of the indictments against him. As a basis for his position, District Attorney Lowder argued that Long was Prosecuting Attorney in the 15th Judicial Circuit of South Carolina where criminal charges were pending against Harry Hunter and that his appearance for Harry Hunter on the trial of the indictments would be "unethical" under Canon of Ethics No. 46C of Part VI of the Rules of The North Carolina State Bar, which was then in force and which is set forth in Appendix B hereto attached. (Record, pp. 16-22; Appendix A, pp. 566-570; Appendix B)

12. After making a detailed inquiry into the facts and hearing the argument of District Attorney Lowder and Attorneys Griffin, Long, and Stroman, Judge Rousseau made the following findings of fact: "That a bill of indictment was issued against the defendant Harry Hunter on or about May 5, 1975; that Mr. James E. Griffin of the Union County bar was employed by Mr. Hunter approximately June 1, 1975; that prior to that time the defendant had employed Mr. James M. Long, and prior to that time had employed Mr. Stroman; that Mr. J. M. Long is the duly elected Solicitor or Prosecuting Attorney for the 15th Judicial Circuit in South Carolina, consisting of Horry and Georgetown Counties; that since the issuance of the Bill of Indictment from Union County the defendant has been indicted in the 15th Judicial Circuit of South Carolina for a felony; that Mr. Long has obtained permission from the proper authorities in South Carolina to not prosecute the defendant in South Carolina, but to leave it to his assistants and the Attorney General's office of the State of South Carolina." Based

on the foregoing, Judge Rousseau made this adjudication: "The Court in its discretion denies the written motion of Mr. Long to appear in the trial of this case in Union County; there being no objection to Mr. Stroman appearing, the Court will allow him to appear in behalf of the defendant." (Record, pp. 22-23)

13. In conformity to North Carolina practice the petitioner noted an immediate exception—his Exception No. 1—to the ruling of Judge Rousseau denying him the right to be represented on his trial in the Superior Court of Union County, North Carolina, by James M. Long, an attorney chosen and retained by him. (Record, p. 23)

14. James E. Griffin, the North Carolina attorney for the petitioner, then moved for a continuance of the case in order to permit the petitioner to employ additional counsel. Since Judge Rousseau had just denied Harry Hunter the right to be represented by James M. Long, an attorney chosen and retained by him, Attorney Griffin believed that the motion required no argument in its support, and announced that he did "not care to argue it." Without making an inquiry as to whether the petitioner desired to retain other counsel to replace Long, Judge Rousseau denied the motion for a continuance, and the petitioner noted his Exception No. 2 to the ruling. (Record, p. 23)

15. Immediately after these events the petitioner was placed on trial before Judge Rousseau and a petit jury upon the indictments charging him with murder and armed robbery. He was defended on his trial by Attorneys James E. Griffin and Ralph Stroman, without the assistance of the excluded Attorney, James M. Long. (Record, pp. 34-36)

16. The evidence of the prosecution and that of the defense were in sharp conflict. While the Supreme Court

of North Carolina ruled on the subsequent appeal that the testimony of the prosecution required the trial judge to submit to the jury the question whether the petitioner was guilty of being an accessory before the fact to the murder of William Benjamin Potts (Appendix A, pp. 576-577), the testimony offered by the petitioner clearly indicated that he did not participate in any way in the activities culminating in the death of William Benjamin Potts. (Record, pp. 161-214) Although they consistently declared at all times prior to the times he testified at their trial in the Superior Court of Union County on April 7, 1975, that the petitioner was not involved in any way in their crime, Billy Devine and Gary Allen Watkins were the chief witnesses for the prosecution and their testimony was indispensable to its case. (Record, pp. 38-87)

17. At the close of all the evidence Judge Rousseau withdrew from the consideration of the jury all charges arising under the indictments except the charge that the petitioner was guilty of being an accessory before the fact to the murder of William Benjamin Potts, which was a charge of a lesser and included offense under the indictment for murder under North Carolina Practice. (*S. V. Bryson,* 173 N. C. 803) The jury returned a verdict finding the petitioner guilty of this offense, and Judge Rousseau sentenced him to life imprisonment in the North Carolina State Prison as mandated by the North Carolina statute, i.e., Section 14-6 of the General Statutes of North Carolina which prescribes the punishment of one convicted as an accessory before the fact to the crime of murder. (Record, pp. 248-249)

18. The petitioner appealed the case to the North Carolina Supreme Court, assigning as errors on the trial the ruling of Judge Rousseau denying him the right to be

represented at the trial by James M. Long, an attorney chosen and retained by him (Record, pp. 22-23, 253); the ruling of Judge Rousseau refusing to continue the trial of the case to permit him to employ additional counsel to replace the excluded attorney, James M. Long (Record, pp. 23, 253); rulings of Judge Rousseau denying his motions to nonsuit the case involuntarily for insufficiency of the prosecution's evidence (Record, pp. 161, 220, 259); rulings of Judge Rousseau admitting evidence offered by the prosecution (Record, pp. 38-134, 254-259) and excluding testimony offered by him (Record, pp. 198, 259); various instructions given by Judge Rousseau in his charge to the petit jury (Record, pp. 223-245, 259-260); and rulings of Judge Rousseau denying his motions to set aside the verdict of the jury and award him a new trial (Record, pp. 246, 247, 260).

19. When the appeal was heard by the Supreme Court of North Carolina, the Attorney General and his assistant and the attorneys for the petitioner argued both orally and in their briefs the various exceptions and assignments of error made by the petitioner, including those challenging the rulings of Judge Rousseau denying the petitioner the right to be represented at the trial by James M. Long, an attorney chosen and retained by him, and those challenging the ruling of Judge Rousseau refusing to continue the trial of the case to permit the petitioner to retain an additional attorney of his own choice to replace the excluded attorney, James M. Long. These observations are made manifest by pages 92 through 99 of the brief of the petitioner and pages 1 through 10 of the brief of the State of North Carolina, which were filed in the North Carolina Supreme Court and which have been certified to the Supreme Court of the United States by the Clerk of the Supreme Court of

North Carolina. This was done at the instance of the petitioner Harry Hunter to make it plain that he insisted at all times that the ruling of Judge Rousseau excluding from the trial James M. Long, an attorney chosen and retained by him, and the ensuing ruling of Judge Rousseau refusing to continue the case for the purpose stated denied him his constitutional rights under the Sixth and Fourteenth Amendments to have the assistance of counsel of his choice for his defense on his trial.

20. On September 1, 1976, the Supreme Court of North Carolina entered its final judgment on the appeal holding that no error had been committed on the trial of the petitioner in the Superior Court of Union County, North Carolina, and leaving his life sentence in force. As appears by pages 566 through 571 of the judgment (a copy of which is set forth in Appendix A), the Supreme Court of North Carolina specifically held that the constitutional right of the petitioner under the Sixth and Fourteenth Amendments to have the assistance of counsel for his defense had not been violated by the rulings of Judge Rousseau denying him the right to be represented at his trial by James M. Long, an attorney chosen and retained by him, and refusing to continue the case in order to permit him to retain additional counsel of his choice to replace the excluded attorney.

21. The rationale underlying the judgment of the North Carolina Supreme Court in respect to the Sixth and Fourteenth Amendment questions may be summarized substantially in its own words as follows:

(A) "An out-of-state attorney has no absolute right to practice law in another forum"; whether he is to be permitted to appear in a particular case is a matter "resting in the sound discretion of the Presiding Judge"; "the decision of Judge Rousseau" denying the petitioner

the right to be represented by James M. Long, an attorney chosen and retained by him, "was made solely in his discretion"; Judge Rousseau exercised his discretion wisely because his action harmonized with Canon 9 of the Code of Professional Conduct of the North Carolina State Bar, which provides that "a lawyer should avoid even the appearance of professional impropriety" and Section 84-2 of the General Statutes of North Carolina, which makes it a crime for a full-time North Carolina district attorney to practice law; in any event the petitioner Harry Hunter was ably defended by other counsel, James E. Griffin, and Ralph Stroman, and "was not prejudiced by the court's decision." For these reasons, the petitioner was not denied his constitutional right to have the assistance of counsel for his defense by the action on Judge Rousseau in refusing to permit James M. Long to appear for him at his trial. (Judgment of the Supreme Court of North Carolina, Appendix A, pp. 566-570)

(B) District Attorney Carroll Lowder advised Attorney James E. Griffin about June 1, 1975, that he would object to James M. Long appearing for the petitioner at the trial and in consequence the petitioner Harry Hunter "had ample time to arrange for the services of another attorney in addition to Mr. Stroman and Mr. Griffin if he so desired"; the petitioner was ably defended by Attorneys Griffin and Stroman at the trial; no "substantial issues concerning the constitutional guarantees" of the Sixth and Fourteenth Amendments in respect to the assistance of counsel "is even involved" in the case; in any event the petitioner "has not been prejudiced by the court's failure to continue the case" in order to permit him to employ additional counsel. For these reasons, the action of Judge Rousseau in refusing to continue the case

for that purpose did not deny the petitioner his Sixth and Fourteenth Amendment rights to the assistance of counsel for his defense. (Judgement of the Supreme Court of North Carolina, Appendix A, pp. 570-571)

22. The only Federal questions arising in the case are those based upon the claim of the petitioner that rulings of Judge Rousseau denied him his right under the Sixth and Fourteenth Amendments to have the assistance of counsel in his defense.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW INVOLVES A SUBSTANTIAL FEDERAL QUESTION RELATING TO THE RIGHT TO COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS APPARENTLY NOT HERETOFORE DECIDED BY THIS COURT.

On May 5, 1975, the grand jury returned to the Superior Court of Union County, North Carolina, two indictments charging the petitioner with attempted armed robbery and murder of William Benjamin Potts in Union County, North Carolina, on February 7, 1975.

Immediately after the return of the indictments, the petitioner, who resided in Horry County, South Carolina, and who has steadfastly claimed to be innocent of the charges, retained James M. Long, of Horry County, South Carolina, an attorney in good standing at the South Carolina bar, to defend him at his trial upon such charges in the Superior Court of Union County, North Carolina. The petitioner was undoubtedly prompted to take this action by his confidence in Long as a lawyer experienced and skilled in the trial of criminal cases.

At the times germane to this case Long was the duly elected and qualified Solicitor, i.e., Prosecuting Attorney,

of the 15th South Carolina Judicial Circuit, whose circuit courts had jurisdiction of felonies and substantial misdemeanors allegedly committed in Horry and Georgetown Counties, South Carolina.

Since the office of Solicitor in South Carolina was not a full-time post, and an occupant of that office was free to practice law privately in any case to which the State of South Carolina was not a party, Long entered into an entirely ethical and lawful engagement when he accepted the petitioner's retainer and agreed to defend him at the trial of the indictments in the Superior Court of Union County, North Carolina. Moreover, there is nothing whatever indicating that he had any reason to suspect that the petitioner would ever be charged with committing any crimes anywhere in the 15th South Carolina Judicial Circuit.

At some time not revealed by the record, but which was substantially after the events set forth above, charges were made in some court in Horry County, South Carolina, that the petitioner had participated in certain felonies in Horry County, South Carolina, during times preceding the slaying of William Benjamin Potts.

Upon this occurrence, Long immediately disqualified himself to appear in any way in the Horry County, South Carolina, cases, and the assistant prosecuting attorneys of Horry County assumed sole responsibility for the prosecution of the same. Shortly thereafter this arrangement was approved by the office of the Attorney General of South Carolina, which apparently had supervisory jurisdiction of the matter under Section 1-255 of the Code of Laws of South Carolina of 1962.

When the indictments were called up for trial at the August 18, 1975, Criminal Session of the Superior Court of Union County, North Carolina, Long made a written motion conforming strictly with the provisions of the

relevant North Carolina statute, i.e., Section 84-4.1 of the General Statutes of North Carolina, to be admitted to practice in the Superior Court of Union County for the sole and limited purpose of defending the petitioner at the trial of the indictments pending in that Court.

The North Carolina District Attorney objcted to Long's motion on the ground that he was Prosecuting Attorney in Horry County, South Carolina, where felony charges were then pending against the petitioner, and for that reason it would be unethical under Canon of Ethics No. 46C of the North Carolina State Bar for Long to appear for the petitioner on the trial of the indictments in the Superior Court of Union County, North Carolina. As appears from its wording, which is set out in detail in Appendix B, Canon of Ethics No. 46C of the North Carolina State Bar prescribed a rule to guide the conduct of Prosecuting officers in North Carolina trial courts and Federal courts and had no application whatever to Long.

In closing the argument before the presiding judge, Superior Court Judge Rousseau, for his motion, Long stated: "I see nothing I have done which in any way - - - affected the effective prosecution of this matter – in that he (the petitioner) is before – this court ready to stand trial –, and I ask and he asks that I be allowed to participate." (Record, p. 20)

After making the findings of fact set out on pages 22 and 23 of the Record and in Paragraph 12 of the foregoing Statement of Case, which harmonize completely with the matters set forth above, Judge Rousseau made this ruling: "The Court in its discretion denies the written motion of Mr. Long to appear in the trial of this case in Union County."

After challenging the validity of the exclusion of Long from the case by an appropriate exception, the petitioner's North Carolina attorney, James E. Griffin, moved

that the trial of the indictments be continued to allow the petitioner to obtain other counsel "if he desires." Believing it to be certain that the presiding judge would grant the motion and thus allow the petitioner a reasonable opportunity to replace his excluded attorney, Long, with other counsel of his choice, Attorney Griffin did not deem it necessary to argue the motion, and thereupon Judge Rousseau denied the motion without pausing to inquire whether the petitioner desired to obtain other counsel to replace Long or needed further time to prepare his defense in the light of the exclusion of Long from the trial.

While the Record is silent on the matter, it seems possible that Judge Rousseau may have been actuated to make his percipitate denial of the petitioner's motion for a continuance by a matter on which the North Carolina Supreme Court laid stress in its opinion, namely, the statement of the North Carolina District Attorney that he advised Attorney Griffin about June 1, 1975, that he would move "to have Mr. Long disqualified as defense counsel for Mr. Hunter—in the event Mr. Long attempted to appear for Mr. Hunter." (Record, p. 23)

The petitioner respectfully submits that the warning of the North Carolina District Attorney does not merit the importance which Judge Rousseau may have given to it and which the North Carolina Supreme Court actually gave to it. Surely an accused who is charged with serious criminal offenses is not obliged to discharge a skilled attorney in good standing at the bar whose retainer by him is both ethical and lawful and replace him with other counsel merely because the District Attorney warns him in advance that he will move to disqualify the attorney if he appears at the trial to fulfill his ethical and lawful engagements to the accused.

Surely, moreover, such an advance warning on the part of the District Attorney does not make it obligatory for an accused to anticipate that the presiding judge will deny him the right to be represented at his trial by an attorney in good standing chosen and retained by him in an ethical and lawful manner and subject him to an immediate trial without affording him any time to obtain replacement counsel or to make an additional preparation for trial which the exclusion of his chosen attorney may necessitate.

Having been convicted by a petit jury of the felony of being an accessory before the fact to the crime of murder and sentenced to life imprisonment, the petitioner appealed to the Supreme Court of North Carolina on the ground, among others, that Judge Rousseau had denied him his right under the Sixth and Fourteenth Amendments to have the assistance of counsel for his defense by denying him the right to be represented by Long, his chosen and retained attorney, at his trial and by refusing to continue the case to permit him to obtain other counsel to replace Long or to make such other preparations for his defense as the exclusion of Long might necessitate.

The North Carolina Supreme Court overruled the claims of the petitioner to these Federal rights and adjudged that Judge Rousseau had not committed any legal errors in his rulings excluding Long from the case and refusing to continue the trial of the case. The rationale underlying the judgment of the North Carolina Supreme Court is stated in paragraph 21 of the foregoing Statement of Case.

When all is said, the North Carolina Supreme Court based its rulings on the Federal questions presented by the petitioner upon these conclusions:

1. That Judge Rousseau did not deny the petitioner his right under the Sixth and Fourteenth Amendments to have the assistance of counsel for his defense by his rulings excluding the petitioner's chosen and retained attorney Long from the case and refusing to continue the trial of the case for the purpose indicated because those rulings related to matters which rested in his sound discretion and he did not abuse his discretion in making those rulings.

2. That even if the rulings of Judge Rousseau excluding Attorney Long from the case and refusing to continue the case did violate the petitioner's right under the Sixth and Fourteenth Amendments to have the assistance of counsel for his defense at his trial, the rulings constituted harmless error of which the petitioner cannot complain because the petitioner was ably defended by other counsel, Attorneys Griffin and Stroman, and in consequence, was not prejudiced by the rulings.

It is undoubtedly true that under common law principles as well as under the statutory provision embodied in subsection (6) of Section 84-4.1 of the General Statutes of North Carolina a motion of an out-of-state attorney to be admitted to practice in a North Carolina Superior Court for the sole and limited purpose of appearing for a particular client in particular litigation is ordinarily addressed to the sound discretion of the presiding judge. It is likewise true that under North Carolina law a motion to continue a civil or criminal action pending in a North Carolina Superior Court is also ordinarily addressed to the sound discretion of the presiding judge.

Under the supremacy clause of Article VI of the Constitution of the United States, however, these North Carolina laws must yield to the Sixth and Fourteenth

Amendments which secure to the accused in all criminal prosecutions in Federal or State Courts "the right—to have the assistance of counsel for his defense."

In ruling that Judge Rousseau had exercised his discretionary power wisely in denying the petitioner the right to be represented by Attorney Long, his chosen and retained attorney, at his trial, the Supreme Court of North Carolina asserted, in substance, that the ruling was in harmony with the public policy of North Carolina as embodied in Canon of Ethics No. 9 of the North Carolina State Bar declaring that North Carolina attorneys should avoid the appearance of impropriety in their professional conduct and Section 84-2 of the General Statutes of North Carolina making it a crime for a North Carolina prosecuting attorney to practice law privately.

Without pausing to observe that neither this Canon nor this statute has any application to his chosen and retained attorney, James M. Long, under the circumstances delineated in the Record, the petitioner respectfully maintains that under the Supremacy Clause of Article VI of the Constitution of the United States any public policy of North Carolina embodied in the Canon or Statute must yield to the Sixth and Fourteenth Amendments guarantee that the accused in any criminal prosecution in any Federal or State Court "shall enjoy the right—to have the assistance of counsel for his defense."

In judging the validity of the petitioner's claims, it is wise to distinguish between the questions which this case does not present and the question which it does present.

This case does not present the question of the power of a state to deny to an out-of-state attorney not licensed by it to practice law the right to engage in the habitual or

general practice of law within its borders or its courts. It does not present the question of the power of a state to deny to an out-of-state attorney not licensed by it to practice law the right to participate in a particular case in its courts when the out-of-state attorney is not in good standing at the bar of the state in which he is licensed to practice, or has acquired by his previous conduct the record or reputation of disrupting judicial proceedings in which he participates.

On the contrary, this case presents this simple question: Does a nonresident accused charged with serious crimes in a court of the forum have the right under the Sixth and Fourteenth Amendments to be represented at his trial by an attorney of his own state who is in good standing in his own state and whose retainer by him is both ethical and lawful?

The petitioner respectfully submits that this simple question must be answered in the affirmative. Otherwise, a state can nullify in its courts the right-to-counsel guarantee of the Sixth and Fourteenth Amendments, which expressly covers the entire United States, by the simple device of clothing its courts with the discretionary power to deny out-of-state attorneys the right to appear before them in particular cases.

Although the right-of-counsel clause of the Sixth Amendment was originally designed to apply to the Federal government only, the Fourteenth Amendment made it applicable to the states because it is basic to due process and fairness. *Escobedo v. Illinois,* 378 U.S. 478; *Gideon v. Wainwright,* 372 U.S. 335; *Burgett v. Texas,* 389 U.S. 109.

As a consequence, an accused in a criminal prosecution in a state court has an unqualified right to retain counsel

of his choice and to be represented in the fullest measure by such counsel at his trial. *Re Groban,* 352 U.S. 330; *Reynolds v. Cochran,* 365 U.S. 525; *Chandler v. Fretag,* 348 U.S. 3; *Hawk v. Olson,* 326 U.S. 271; *House v. Mayo,* 324 U.S. 42.

The Record compels the conclusion that Judge Rousseau denied the petitioner his Sixth and Fourteenth Amendment right to have the assistance of counsel for his defense when he excluded his chosen and retained attorney, James M. Long, from the trial. Moreover, the Judge compounded his violation of these Amendments by denying the petitioner's motion for a continuance and forcing him to immediate trial without allowing him a reasonable time to obtain replacement counsel or to make such other preparations for his trial as the exclusion of his chosen and retained counsel made advisable. *White v. Ragen,* 324 U.S. 760; *Powell v. Alabama,* 287 U.S. 45.

II.

THE DECISION BELOW DECIDES SUCH QUESTION IN A WAY INCOMPATIBLE WITH PREVIOUS DECISIONS OF THIS COURT.

To be sure none of the cases cited involved the exclusion of an out-of-state attorney. Indeed, diligent research has failed to reveal any decision of the Supreme Court of the United States relating to the exclusion of such an attorney.

The Sixth and Fourteenth Amendments constitute the supreme law of the land in all areas within the borders of the United States, make no distinction between local and out-of-state attorneys, and secure to every person in any criminal prosecution in any court, Federal or State, the right to have the assistance of an attorney chosen and retained by him for his defense.

As the Supreme Court states, in essence, in the landmark case of *Powell v. Alabama,* supra, (287 U.S. 45)

the constitutional right to counsel is one of those "immutable principles of justice which inheres in the very idea of free government" and "which no member of the Union may disregard." (287 U.S. pp. 71-72)

Hence, neither North Carolina nor any other state can nullify this immutable principle of justice in criminal prosecutions in its courts by the simple expedient of vesting them with discretionary power to deny the accused the right to be defended by an out-of-state attorney chosen by him.

The North Carolina Supreme Court adjudged that in any event Judge Rousseau's denial of the right of the petitioner under the Sixth and Fourteenth Amendments to have the assistance of his chosen and retained counsel, James M. Long, for his defense constituted harmless error of which he cannot complain because he was ably defended by other attorneys at his trial.

This adjudication makes the petitioner's constitutional right to the assistance of counsel of his choosing a hollow mockery and reduces the Constitution itself to a worthless scrap of paper. It certainly cannot be reconciled with the Supremacy Clause of Article VI of the Constitution which declares that "this Constitution—shall be the supreme law of the land; and the Judges in every state shall be bound thereby; any thing in the Constitution or laws of any state to the contrary notwithstanding."

Moreover, it is incompatible with the holdings of this Court that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," *Chapman v. California*, 386 U.S. 18; and that among them is the constitutional right to the assistance of counsel for the accused's defense in a criminal prosecution. *Gideon v. Wainwright*, supra (372 U.S. 335); *Reynolds v. Cochran*, supra, (365 U.S. 525, footnote 12); *Chandler v. Fretag*, 348 U.S. 3.

While it is a decision of an inferior Federal Court involving the exclusion by the United States District Court of the Middle District of Pennsylvania of New Jersey attorneys chosen and retained by New Jersey residents charged with crime in such District Court, the decision of the United States Court of Appeals for the Third Circuit in *United States v. Bergamo*, 154 F.2d 31, sheds light on the problem under present consideration.

In reversing the convictions of the New Jersey residents, the Circuit Court said:

"The Sixth Amendment provides inter alia that 'in all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense.' The Supreme Court has held that the right to the assistance of counsel includes the right to counsel of the defendant's choosing. * * * To hold that defendants in a criminal case cannot be defended by out-of-district counsel selected by them is to vitiate the guarantees of the Sixth Amendment. * * * Since they were deprived of a constitutional right the judgment of conviction pronounced by the court was void."

III.

THE DECISION BELOW PRESENTS SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE RIGHT TO COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.

The petitioner urges with all emphasis that the Supreme Court should grant the writ of certiorari and review the judgment of the Supreme Court of North Carolina.

It is highly important for it to do so for these reasons:

1. The North Carolina Supreme Court has decided a federal question of substance which has apparently never

been heretofore determined by this Court, namely, that the Sixth and Fourteenth Amendments permit a state to confer upon its courts the discretionary power to deny an out-of-state resident the right to be defended in a criminal prosecution by counsel of his own choosing who is an attorney in good standing at the bar of the state in which the accused resides.

2. The North Carolina Supreme Court has decided this federal question in a way which is not in accord with the decisions of this Court, such as *Re Groban*, supra, (352 U.S. 330), which construe the Sixth and Fourteenth Amendments to secure to an accused in a criminal prosecution "an unqualified right * * * to be heard through his own counsel."

3. As the *Bergamo Case* indicates, the mobility of the American people and their desire to be defended by attorneys whom they know and who reside in their own localities when they are subjected to criminal prosecutions in other states render the question presented by this case one of high pragmatic importance and make its decision by this Court imperative if the Sixth and Fourteenth Amendments to the Constitution are to operate with uniformity throughout the United States.

CONCLUSION

For these reasons, a writ of certiorari should be granted to review the judgment and opinion of the Supreme Court of North Carolina.

This the 15th day of November, 1976.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 26th day of November, 1976, I mailed three copies of the petition for a writ of certiorari by registered mail with postage prepaid to Rufus L. Edmisten, the Attorney General of North Carolina, who is counsel for the respondent, at his office in the North Carolina Department of Justice, Justice Building, Raleigh, North Carolina 27602. I further certify that all parties required to be served have been served.

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Counsel for Petitioner.

APPENDIX

APPENDIX A

[Judgment of the Supreme Court of North Carolina]

STATE OF NORTH CAROLINA v. HARRY HUNTER

No. 44

(Filed 1 September 1976)

1. Constitutional Law § 32— out of state counsel not permitted — right to counsel not abridged

Defendant was not denied his right to counsel under the Sixth and Fourteenth Amendments to the U. S. Constitution by the trial court's refusal to allow a S. C. solicitor from the district in which defendant's beach motel was located to represent defendant in this N. C. prosecution, since defendant was represented by an able N. C. attorney and by the S. C. attorney who normally handled defendant's business affairs.

2. Criminal Law § 91— continuance to obtain additional counsel — denial proper

The trial court did not err in denying defendant's motion to continue the case in order to permit him to employ additional counsel, since defendant was represented by two attorneys and there was no indication or allegation that he even wished to obtain another lawyer or that other counsel was necessary to prepare adequately the defense.

3. Criminal Law § 169— objectionable testimony — similar testimony admitted without objection — no prejudice

Defendant was not prejudiced by testimony concerning his participation in a separate crime since testimony of like import was thereafter admitted without objection.

4. Criminal Law § 34— defendant's participation in other crimes — evidence admissible

In a prosecution of defendant for first degree murder and armed robbery or attempted robbery where the court submitted to the jury only the issue of defendant's guilt as an accessory before the fact to murder, evidence of defendant's participation in other breakings, enterings and larcenies together with other evidence showing the relationship of the defendant with the other men involved in the crimes tended to establish a common plan or scheme embracing the commission of a series of larcenies so related to each other that proof of these other crimes tended to prove the crime charged and to connect the accused with its commission; therefore, the trial court properly admitted evidence of defendant's participation in other crimes.

5. Criminal Law § 43— slides of murder victim's wounds — admissibility

The trial court did not err in allowing the jury to view slides of the wounds of a murder victim, since the slides were relevant upon the question of cause of death and the slides illustrated the testimony of a medical witness.

6. Criminal Law § 10— accessory before the fact — proof required

To convict defendant of being an accessory before the fact the State must prove (1) that the defendant counseled, procured, com-

manded, encouraged, or aided another to commit the offense; (2) the defendant was not present when the crime was committed; and (3) the principal committed the crime.

7. Homicide § 21— accessory before the fact to murder — sufficiency of evidence

In a prosecution for accessory before the fact to murder, evidence was sufficient to be submitted to the jury where it tended to show that defendant was not present when the crime was committed, the principal committed the crime, defendant told one of the parties to the crime that the victim kept a substantial amount of money on him or in his possession which they could steal, defendant told another person that he would help set up the crime, defendant informed his companions in the crime that he planned to have he larceny occur while the victim dined at his house, defendant later informed them that they would have to catch the victim at home because defendant did not know where the money was, defendant showed his cohorts where the victim's home was, he instructed them to come back to his house after the "job," and it was understood that defendant was to get 25% of the money stolen.

8. Criminal Law § 112— proof beyond a reasonable doubt — sufficiency of instructions

Though two sentences of the trial court's instructions as to the elements of the crime that the State must prove in order for the jury to find defendant guilty failed to inform the jury that such proof must be shown by evidence establishing the enumerated elements beyond a reasonable doubt, such failure did not amount to a violation of G.S. 1-180, since the court's charge as a whole made it clear to the jury that each element had to be proved by evidence establishing the same beyond a reasonable doubt.

9. Homicide § 25— accessory before the fact to murder — jury instructions proper

In a prosecution of defendant for accessory before the fact to murder, the trial court's instructions (1) concerning the immediate causal connection between the counseling of the principal by the defendant and the commission of the crime by defendant, (2) as to whether defendant and the principal entertained the common design that the principal take money from the person or presence of deceased by violence or intimidation, and (3) summarizing the evidence were proper.

10. Homicide § 25— felony-murder — failure to instruct on elements of underlying felony — no prejudicial error

Although the trial court should have spelled out the essential elements of the underlying felony of attempted armed robbery in its instructions as to what the State must prove to convict defendant of being an accessory before the fact to felony-murder, his failure to do so was not prejudicial error because: (1) the occurrence of the attempted armed robbery was not disputed and thus was not in issue under the evidence of the case, (2) defendant failed to request specifically instructions on the underlying felony, (3) the court did

define "attempted armed robbery" as "attempted robbery with a firearm," and (4) these terms were essentially self-explanatory under the circumstances of this case.

Judge EXUM concurs in result.

Justice LAKE dissenting.

APPEAL by defendant pursuant to G.S. 7A-27(a) from *Rousseau, J.*, at the 18 August 1975 Criminal Session of UNION County Superior Court.

On two separate indictments, proper in form, defendant was charged (1) with first-degree murder of William Benjamin Potts and (2) with armed robbery or attempted robbery of William Benjamin Potts. The court submitted to the jury only the issue of his guilt as an accessory before the fact to murder. The jury returned a verdict of guilty, and a sentence of life imprisonment was imposed.

The evidence for the State tended to show the following: Billy Wade Devine, Gary Allen Watkins, and James Earl Locklear had pleaded guilty to second-degree murder of Potts at a previous term and received life sentences. Devine and Watkins testified for the State.

The defendant had lived at Myrtle Beach, South Carolina, during the summer months for many years. He was past 60 years in age and was married to his present wife in 1974. He owned and operated the Bay Shore Motel at Myrtle Beach, South Carolina. He had a home in Union County, North Carolina, located between Monroe, North Carolina, and Pageland, South Carolina. It was his custom to spend the winter season at his Union County home.

Gary Watkins testified that he supported himself by stealing and that he and Charles Duncan (also known as Charles Evans) had not worked at any lawful occupation for at least 3½ years. Watkins, who was with Duncan and another man at the time, met the defendant about August, 1973, at the Bay Shore Motel.

Billy Devine testified that the defendant and Charles Duncan were not friends of his. They were just people who put him onto "jobs" (larcenies). In the summer of 1974, Devine met the defendant at the Bay Shore Motel in the presence of Watkins and Duncan.

Devine and Watkins first visited the defendant with Duncan at the defendant's Union County home in the summer or winter of 1974. Prior to 7 February 1975, Devine visited the defendant about three times at his Union County home. Watkins visited the defendant there a total of three or four times.

Devine, Watkins, and Duncan visited the Bay Shore Motel six or seven times during the 1974 summer, and the defendant was there on every occasion. Devine and Watkins paid rent there only once or twice. The inference was that generally no rent was charged.

During the summer of 1974, the defendant discussed a "job" with Devine and Watkins involving the theft of a safe from the home of Tony Thompson at Myrtle Beach. The defendant told them the Thompson family had some money because they owned Dino's Restaurant. He gave Watkins the tools to open the safe. When Watkins and Devine broke into the house through the back door on 21 July 1974, they unexpectedly encountered a Greek lady, whom Watkins threw to the floor and tied up with the assistance of Devine. They hauled the safe away, but it was found to be empty when they opened it. They dumped the safe in a canal.

During the summer of 1974, the defendant, Charles Duncan, Devine, and Watkins had a conversation about breaking into the Atlas Construction Company at Myrtle Beach and stealing some diamonds and guns. The defendant explained to the others what could be obtained and where the company was located. Watkins, Devine, and Duncan broke into the establishment on 30 August 1974. No diamonds were found, but they did take thirty guns of various descriptions. These were brought back to the Bay Shore Motel, and the defendant picked out two or three guns for himself. One of these was a .25 Colt Automatic Pistol (identified in evidence as State's Exhibit 1), which was later found as a result of a valid search at the Bay Shore Motel on 14 May 1975 when the defendant reached in a drawer and handed it to officers. Another of these was a Police Special .38 Pistol (identified as State's Exhibit 2), which Devine testified Watkins had on 7 February 1975 and was found on that date under the driver's side of the front seat of the Grand Prix automobile that Watkins was operating. It was apparently understood that anyone who planned a "job" would receive a part of the proceeds. The remaining guns were disposed of by

Duncan, and the money was distributed among Duncan, Devine, and Watkins.

On the night of the Atlas Construction Company break-in or immediately afterwards, the defendant told Devine about two men, a Mr. Potts in Union County and a Mr. Cato in Pageland, South Carolina, nearby. The defendant said they kept a substantial amount of money on them or in their possession that the defendant and Devine could steal. The defendant also discussed these two men and the available money with Watkins. The defendant told him that he would help set it up for them.

Another break-in and larceny was discussed by Gary Watkins and the defendant. He suggested a house that was owned by Allison Davis and located just past Ocean Drive in North Myrtle Beach. He described the house and said that the Davis family had a lot of money because they paid cash for a Mercedez-Benz and still had a safe in the house. On 17 December 1974, Devine, Watkins, and Duncan broke into the house through a back door but found no safe and left.

After two weeks before 7 February 1975, the defendant told Watkins that he would invite Mr. Potts for supper and Watkins and the others would break in the Potts' house and take the money.

About a week before 7 February 1975, Devine, Watkins, Duncan, Locklear, and a Curt Petty drove in Duncan's 1974 Grand Prix automobile to the home of defendant Hunter in Union County. They went to Hunter's home to find out if he had any further information on Mr. Cato or Mr. Potts. When they arrived, Locklear and Petty stayed in the car while the others went inside. Devine showed Hunter his .9 mm. Automatic Pistol, later identified as State's Exhibit 3. Hunter wanted to trade the .25 Colt Automatic Pistol that he had received from the Atlas Construction break-in for the .9 mm. Automatic Pistol. Devine declined, saying that he would be laughed at if he tried armed robbery with a .25 Colt Automatic. As Devine, Watkins, and Duncan were getting ready to leave. Hunter told him that he would try to arrange for Mr. and Mrs. Potts to come to his house for dinner and they could go and take the money at the Potts' house, but at the time he had not found out where the Potts kept the money. Later he indicated to Watkins that they would have to catch Potts at his home because Hunter did not know where the money was. He stated that

Potts had had an eye operation and could not see well. Hunter pointed out the nearby house of Potts to them. Hunter told Devine that they were to come back to Hunter's house after the robbery if anything went wrong.

On 7 February 1975, Devine, Watkins, and Locklear were in a motel in Mecklenburg County, North Carolina. Devine was in danger of being caught concerning a breaking and entering in South Carolina, and they had to leave the motel rapidly. Later that afternoon, Devine and Watkins had a conversation with Duncan and borrowed his Grand Prix automobile. Devine, Watkins, and Locklear then left Charlotte, North Carolina, and drove to Monroe. On the way they stopped and broke into a veterinarian's office for the purpose of stealing some drugs, but stole money instead and then proceeded to the home of Potts. Watkins was driving and let out Devine and Locklear at the Potts' house. They went to the door, and Devine asked to use the telephone. He was permitted in the house with his pistol (State's Exhibit 3) under his coat. Potts came to the door, and as Mrs. Potts was about to show him the telephone, Devine thought he saw a pistol in Potts' hand. Potts grabbed at Devine's arm, and Devine started shooting. He thought Potts fired back, and Devine continued shooting. Devine did not know how many times he shot. Potts died as a result of the gunshot wounds. Mrs. Potts turned on the burglar alarm.

Devine and Locklear fled from the Potts' house to defendant Hunter's house nearby. Hunter came out and asked what was wrong. Devine said that nothing was wrong. He indicated they were supposed to meet Watkins there. Hunter asked them in, but they stayed inside only a few moments. About that time, Hunter came out and said, "Somebody has been shot. Get the hell out of my yard. I don't want nobody to see you." Devine and Locklear left by a route through the woods. When they were about 500 yards from Hunter's house, they saw Watkins drive up at Hunter's house. They were afraid to return and watched as Watkins drove away. Devine discarded his pistol and coat. They walked some six miles and were later apprehended. When Watkins drove up in the Grand Prix, he was told by Hunter to "get the hell out" and was soon apprehended near Monroe. Hunter had told Devine and Watkins to come back to his house after the "job." It was understood that Hunter was to get twenty-five percent of the money stolen.

After the shooting occurred, Mrs. Potts called her neighbors, and in turn the Hunter residence was called. Apparently this happened about the time that Devine and Locklear arrived. Neither Hunter nor his wife went to the home of Potts that evening, and neither Hunter nor his wife have been to the Potts' house since the murder. Hunter and Mrs. Potts had been reared together as children in Pageland, South Carolina.

The Sheriff's Department made a prompt investigation and, in the course of it, called Hunter about 12:00 o'clock that night. Hunter told the Sheriff about Devine, Watkins, Locklear, and Duncan's being at his home on the afternoon of February 7 but on that night never mentioned that Devine, Locklear, and Watkins visited his house about 10:00 p.m. that evening. The sheriff talked to Hunter again the next morning. Mrs. Hunter was not present although the sheriff understood she would be there. On this occasion Hunter told the sheriff about Devine, Locklear, and Watkins' coming by the house about 10:00 p.m., the night before. He had no particular explanation for why they came to his house at that time.

Hunter testified for the State when Devine, Watkins, and Locklear pled guilty to second-degree murder. He had previously identified them from photographs on 8 February 1975 when Sheriff Fowler was at his house.

In the course of the investigation, the pistol that Devine had discarded was located at the place he indicated. Tracks were found leading from the Potts' house to the Hunter house and away from it. The jacket of Devine was found along the route. Sunglasses that Devine had lost as he was running away were also located.

Devine and Watkins did not agree to testify against Hunter until after they had been sentenced for second-degree murder. Watkins was incarcerated in the prison camp at Lillington, and Devine was in Central Prison. Some time after Watkins was sentenced to prison, his father committed suicide because of what had happened to his son. Watkins' mother came to the prison camp and talked to him. As a result Watkins contacted Sheriff Fowler, who met with Watkins' attorney and the District Attorney at the prison camp at Lillington, whereupon Watkins proceeded to implicate defendant Hunter. Later Devine did likewise.

On 1 May 1975, a man named Richard Mears contacted the defendant at Myrtle Beach. He told the defendant that he had talked with Charles Duncan in Charlotte about purchasing stolen jewelry from Hunter. On 3 May 1975, the defendant told Mears that he wanted "to place a contract on Devine and Watkins." They discussed the terms for this proposed killing, and it was agreed that Hunter would pay Mears $5,000 to kill the two. He paid him $100 in advance for expenses. In the course of the conversation, the defendant told Mears that he had planned the robbery of Potts and that Watkins and Devine, instead of doing the robbery, broke into a store and later went berserk when they attempted to rob the "old man." Mears also discussed this "contract" with Hunter on 6 and 8 May 1975.

The State offered corroborative evidence from officers at Myrtle Beach that there were break-ins at Myrtle Beach in the summer of 1974 as Devine and Watson had testified.

Defendant's evidence tended to show:

Duncan received a telephone call from Sheriff Fowler about 11:40 p.m. on the night of the murder. The call concerned the Grand Prix automobile that Duncan had loaned Devine and Watkins. Duncan denied knowing anything of the break-ins at Myrtle Beach. Duncan had known the defendant for 4½ years. He indicated that he might see Devine and Watkins two or three days each week in the Charlotte area. He denied committing any crimes for Hunter. His business was buying and selling merchandise ranging from TV's to guns. He denied ever seeing Richard Mears. Duncan admitted to having served a total of 15½ years in prison for breaking, entering, and larceny. At the time of the murder, Duncan was wanted on a burglary charge and was running from the law. He went to the jail to see Watkins and Devine several times while they were awaiting trial. Duncan said neither Watkins nor Devine ever told him that the defendant was involved in the robbery and murder.

The defendant testified that he had operated a motel and liquor store at Myrtle Beach for the past 17 years. He had a residence south of Monroe, which he occupied during the winter months. He knew Duncan, Watkins, Devine, and Locklear. He admitted that Duncan, Watkins, and Devine stayed at his motel at Myrtle Beach but said he did not know Locklear before 7 February 1975. Duncan, Watkins, Devine, and Locklear came to his house on the afternoon of 7 February 1975. Duncan and

Watkins spoke briefly with Mrs. Hunter, who was in the bedroom. Afterwards, Duncan, Watkins, Devine, and Locklear inquired as to when the motel would open. Watkins and Devine had asked several times for work at the motel. The defendant denied any conversation about Potts with Duncan, Watkins, or Devine at any time.

Devine and Locklear came to Hunter's house between 10:00 and 10:30 p.m. on the night of 7 February 1975. They said that Watkins was supposed to pick them up. Hunter invited them in to look at television. While this was happening, his wife was on the telephone, and he heard her say "Oh, no." She ran down the hall and told him that Mr. Potts had been shot and robbed. He went back to the living room, and Devine and Locklear were gone. Potts' name had never been mentioned by them.

Shortly after Devine and Locklear left, two neighbors, Mr. and Mrs. Goodall, came in and borrowed a shotgun. Shortly thereafter, Gary Watkins arrived. He rang the back doorbell and asked about Devine and Locklear. Hunter told him they had left. Nobody mentioned Potts.

Hunter had a conversation with Sheriff Fowler about midnight. He said he told Sheriff Fowler about Devine, Locklear, and Watkins' coming to his house that night and that they with Duncan had been by his house that afternoon. The next morning, Sheriff Fowler called again and wanted to see Hunter and his wife. When the sheriff and others arrived at Hunter's house, his wife, who had gone to the doctor, was not there. On this occasion, Hunter identified pictures of Devine, Locklear, and Watkins and again told the sheriff about their being there the afternoon before as well as later that night. Hunter said Devine and Watkins knew Mr. and Mrs. Potts, having met them at his house about a week before. Hunted had no knowledge of Potts' financial condition but traded at his store from time to time, changed money, and cashed checks. Hunter said that he did not go to Potts' house the next day because he was waiting for the sheriff. He had called Mrs. Potts two or three times since then, but she was never in a position to see him and his wife.

Hunter identified State's Exhibit 1, the Colt Automatic .25. He said Gary Watkins had pawned it to him at the beach for $25. This gun was kept by Hunter at the beach. Hunter admitted to having dealings with Devine and Watkins, having bought

two shotguns from them in Decemher 1974 for $400. He admitted seeing Richard Mears on 14 May 1975 when the defendant was in the jail in Conway, South Carolina, for possession of a stolen pistol, State's Exhibit 1, but denied ever seeing him prior to that time or talking to him about killing Devine and Watkins as alleged by Mears. He also denied having ever benefited from anything stolen by Watkins or Devine and having ever discussed any crimes with them. Charles Duncan was a good friend with whom he had been out on a social basis two or three times. He did not know what Duncan's business was. Hunter said he had not been to the Potts' store for 8 weeks before Potts' death because he had a bad back. He had known Mrs. Potts since he was a small boy, and she was his friend. He denied ever discussing Potts or Cato with Devine, Watkins, or Locklear.

He said he did not go to the Potts' house on the night of the killing because his wife was sick and asked him to stay home. He did not go later because Mrs. Potts was upset. He cooperated with the sheriff. He had never been arrested for anything prior to 14 May 1975. When he paid Devine and Watkins $400 for the two shotguns in December 1974, the check was written by Mrs. Potts and made out to cash and later cashed by Duncan from a man named Ross, who had been called by Hunter.

Elizabeth Ann Hunter, the wife of defendant, said she knew Duncan, Devine, and Watkins. She was married to the Defendant in 1974. She said that at her request the defendant did not go to the Potts' house on the night of the murder because of her ill health. She talked to Sheriff Fowler the next morning but told him she had to go to the doctor.

Duncan, Devine, and Watkins had been to Hunter's house in Union County two or three times. They stayed at the motel at the beach during the summer of 1974 and always paid their bills. Mrs. Hunter was a close friend of Duncan and his girl friend. They were in and out of the motel during August and September, 1974, as well as the July 4th weekend of that year. Duncan always paid his room rent in cash. Mrs. Hunter's doctor said she did not have an appointment with him on February 8 but she came to his office.

Some witnesses from Myrtle Beach gave the defendant a good reputation.

On rebuttal State's Evidence tended to show the following: Sheriff Fowler talked with Mrs. Hunter about midnight on 7 February 1975 when she told him that Duncan, Devine, Watkins, and another man came to their house in the afternoon and she spoke with two of them briefly. However, she said nothing at that time about Devine, Locklear, and Watkins' coming back that night about ten o'clock. Neither did she tell him about going to the doctor when he talked to her on the morning of February 8. She agreed to meet him but was gone when he arrived. Two Myrtle Beach officers gave the defendant a bad reputation but admitted that he had never been arrested for anything.

It has been difficult for us to ascertain the facts from the brief of defendant and the State. The facts in defendant's brief cover 80 pages. The State's brief had no statement of facts, except as discussed in the assignments of error. We note that Rule 28(b) (2) of the Rules of Appellate Procedure, among other things, requires that the appellant's brief " . . . should additionally contain a short, non-argumentative summary of the essential facts underlying the matter in controversy where this will be helpful to an understanding of the questions presented for review." The State is not required by Rule 28(c) of the Rules of Appellate Procedure to state the facts unless there is some disagreement.

Because of the failure to comply with the rules, it has been difficult for us to glean the facts from a complicated situation.

Other pertinent facts will be discussed in the opinion.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General John M. Silverstein for the State.

James E. Griffin, Charles D. Humphries, Robert M. McInnis (on brief, from North Myrtle Beach, South Carolina) and Sam J. Ervin Jr., for defendant.

COPELAND, Justice.

[1] Defendant contends that the court erred in not permitting James M. Long of the South Carolina Bar to represent Hunter at the trial. He says that this action of the trial court denied him his right to counsel under the Sixth and Fourteenth Amendments. As authority for this position he cites *United States v. Johnston*, 318 F. 2d 288 (6th Cir. 1963) and *United States v.*

Bergamo, 154 F. 2d 31 (3d Cir. 1946). The present case is distinguishable from these cases on the basis of its facts.

Defendant was ably represented by local counsel in Union County, Mr. James Griffin, as well as by a South Carolina attorney by the name of Mr. Ralph Stroman, who normally handled defendant's business affairs. On 18 August 1975, the date set for the trial of this case, defendant made a motion to admit counsel James M. Long to appear in the case. The trial judge made an exhaustive inquiry, and it was determined that Mr. Long was the solicitor (chief prosecuting attorney) for the Fifteenth Judicial Circuit in South Carolina, which included Horry County, in which Myrtle Beach is located. § 1-255 of the Code of Laws of South Carolina (1962) provides:

> "The solicitors may defend any persons brought to trial before any criminal courts of this State when their duty shall not require them to prosecute such persons and their assistance shall not be required against such persons by the Governor or Attorney General."

Long told the trial court that he had been retained by defendant on 5 May 1975, after having been informed by District Attorney Lowder of Union County that a bill of indictment had been returned against Hunter in Union County. Mr. Stroman had been contacted by the defendant about this matter several days before Mr. Long was contacted. Mr. Griffin was retained by defendant about 1 June 1975.

District Attorney Lowder told the trial court that Mr. Long had originally been requested to assist him in the arrest of Mr. Hunter but he received no help from Mr. Long. In fact, Long assisted Hunter in making bond on the murder charge.

Sometime after Long was retained, criminal charges were brought against defendant Hunter in Long's district. Long indicated that these cases were being handled by his assistants. The Attorney General of South Carolina filed a writ in the Supreme Court of South Carolina to restrain Mr. Long from participating in South Carolina in cases involving defendant Hunter. After Mr. Long explained that his assistants were handling the prosecution in South Carolina and that he was totally removed from the South Carolina prosecution, the matter was withdrawn by the Attorney General. At the time of this motion, however, the matter was still before Chief Justice Lewis of the Supreme Court of South Carolina.

It is well settled that an out-of-state attorney has no absolute right to practice law in another forum. It is permissive and subject to the sound discretion of the Court. *Thomas v. Cassidy*, 249 F. 2d 91 (4th Cir. 1957), *cert. denied*, 355 U.S. 958, 78 S.Ct. 544, 2 L.Ed. 2d 533 (1958); *Cooper v. Hutchinson*, 184 F. 2d 119 (3d Cir. 1950); *Parker v. Parker*, 97 So. 2d 136 (Fla. App. 1957); *State v. Kavanaugh*, 52 N.J. 7, 243 A. 2d 225 (1968), *cert. denied*, 393 U.S. 924, 89 S.Ct. 254, 21 L.Ed. 2d 259 (1968); *Manning v. Railroad*, 122 N.C. 824, 28 S.E. 963 (1898); *Smith v. Brock*, 532 P. 2d 843 (Okl. 1975); 7 Am. Jur. 2d, Attorneys at Law, § 10 (1963 and Cum. Supp. June, 1976); 7 C.J.S. Attorney and Client § 15(b) (1937 and Cum. Supp. 1976).

G.S. 84-4.1 (1975 and 1975 Supp.) gives the conditions that must be met by out-of-state attorneys in order for them to be admitted to practice for limited purposes in North Carolina. Subsection 6 thereof states:

> "Compliance with the foregoing requirements shall not deprive the court of the discretionary power to allow or reject the application."

Our Court in *Manning v. Railroad*, *supra* at 828, 28 S.E. at 964 had this to say concerning nonresident counsel:

> "[T]he appearance of such counsel is a matter of courtesy in each and every case, and on motion in each case, and only for the occasion on which it is allowed. The statute forbids the courts from allowing non-resident counsel (when citizens of other States and not holding license from this Court) from practicing habitually in our courts, and they cannot acquire the right to do so."

In *Smith v. Brock*, *supra*, Oklahoma considered a rule of practice analogous to our G.S. 84-4.1. The foreign attorney had in the past engaged in disorderly and disruptive tactics in both the Oklahoma and Texas Courts. The Oklahoma Court declined to permit the out-of-state counsel to appear. The Oklahoma Supreme Court relied in part on *State v. Kavanaugh*, *supra*, wherein that court rejected Mr. F. Lee Bailey's contention that the defendant had a constitutional right to select an attorney who was not a member of the New Jersey Bar. In denying his right to appear, the New Jersey and Oklahoma Supreme Courts quoted with approval the following from *Thomas v. Cassidy*, *supra:*

"'It is well settled that permission to a non-resident attorney, who has not been admitted to practice in a court, to appear pro hac vice in a case there pending is not a right but a privilege, the granting of which is not a matter of grace resting in the sound discretion of the presiding judge. [Cases cited.]'" *Smith v. Brock, supra* at 848.

The Oklahoma Supreme Court in *Smith v. Brock, supra* at 850, also quoted with approval the following statement made in *Cooper v. Hutchinson, supra* at 122:

> "The narrower question here is the extent to which an accused person's choice of counsel is a constitutional right. The argument insists that there is a constitutional right, at least in a capital case, to whatever counsel an accused person pleases to have. If that counsel is not a member of the bar of the state where the prosecution is being conducted, still, the argument runs, the accused may effectively choose him just as freely as he could choose a lawyer admitted to practice locally. The person chosen by the accused may then insist upon conducting the defense in the local courts. Control by the states over the persons who may be licensed to practice law in their courts would thus be greatly diminished in every capital criminal prosecution where the accused desires counsel from somewhere else.
>
> "The length to which this argument takes one is startling. It has always been thought that the license to practice law is limited, except as a matter of grace, to persons who had fulfilled the local requirements for practice."

From the very beginning it is clear that Mr. James E. Griffin would be the lead counsel in the case. It is well known that Mr. Griffin is one of the leading trial attorneys in Union and surrounding counties. The District Attorney made it clear to Mr. Griffin approximately 1 June 1975 that he would object to having Mr. Long appear in the case on behalf of defendant. The trial judge permitted Mr. Stroman, defendant's personal attorney in Horry County, South Carolina, to appear with Mr. Griffin. Certainly under this set of facts, defendant cannot contend he was prejudiced by the court's decision. His constitutional right to counsel was not abridged.

It is interesting to note that the 1976 South Carolina General Assembly (recently adjourned) required all solicitors to

serve as full-time employees for the State of South Carolina effective 1 January 1977, but those in office on 1 July 1976 whose terms expired in 1979 were not required to comply during their terms. "An Act . . . To Provide That Solicitors In This State Shall Be Full Time Beginning January 1, 1977 And To Provide Exceptions. . . . " R 819, S 785. Approved the 30th day of June, 1976.

The decision of Judge Rousseau was made solely in his discretion. He acted wisely and properly to insure compliance with Canon 9 of the Code of Professional Responsibility of the North Carolina State Bar (G.S. Vol. 4A (Cum. Supp. 1975)), which states:

> "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." See DR9-101(B).

Canon 5 of the Code of Professional Responsibility states:

> "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." See DR 5-105."

Additionally, our law makes it a crime for a full-time district attorney to practice law. G.S. 84-2 (1975). This assignment of error is overruled.

[2] Under the second assignment of error, defendant contends that the court erred in denying the motion of defendant to continue the case in order to permit defendant to employ additional counsel.

When this motion was made, Mr. Griffin stated that it was "to allow Mr. Hunter to obtain other counsel if he so desires." There was no indication or allegation that the defendant even wished to obtain another lawyer or that other counsel was necessary to adequately prepare the defense. In fact, defendant's counsel, Mr. Griffin, declined to argue this motion. As previously noted, Mr. Griffin had been aware for more than two and one-half months that the District Attorney would object to Mr. Long's appearance in the case. It is apparent from the foregoing that defendant had ample time to arrange for the services of another attorney in addition to Mr. Stroman and Mr. Griffin if he so desired.

The constitution guarantees that the defendant and his counsel shall have a reasonable time to prepare the case for trial. *State v. Phillip*, 261 N.C. 263, 134 S.E. 2d 386 (1964),

cert. denied, 377 U.S. 1003, 84 S.Ct. 1939, 12 L.Ed. 2d 1052 (1964); *State v. Lane*, 258 N.C. 349, 128 S.E. 2d 389 (1962); *State v. Speller*, 230 N.C. 345, 53 S.E. 2d 294 (1949). The right to the assistance of counsel is guaranteed by the Sixth and Fourteenth Amendments to the U. S. Constitution and by Article 1, §§ 19 and 23 of the North Carolina Constitution. *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *State v. Cradle*, 281 N.C. 198, 188 S.E. 2d 296 (1972), *cert. denied*, 409 U.S. 1047, 93 S.Ct. 537, 34 L.Ed. 2d 499 (1972). However, under the facts of this case, we do not believe any substantial issue concerning these constitutional guarantees is even involved. Certainly, defendant has not been prejudiced by the court's failure to continue the case for this purpose. The motion for continuance was properly denied. *State v. Harrill*, 289 N.C. 186, 221 S.E. 2d 325 (1976); *State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495 (1975); *State v. Gibson*, 229 N.C. 497, 50 S.E. 2d 520 (1948). The assignment of error is overruled.

Under Assignments of Error 9-13, 16, 17, 19, 20, 25-32, 34-36, 38-40, defendant contends the court erred in admitting evidence of other offenses committed by the defendant.

As a general rule, in a prosecution for a particular crime the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense. However, this rule is subject to certain well recognized exceptions. In the landmark case of *State v. McClain*, 240 N.C. 171, 176, 81 S.E. 2d 364, 367 (1954), the sixth exception which we will subsequently discuss, is stated as follows:

> "6. Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission. [Citations omitted.] Evidence of other crimes receivable under this exception is ordinarily admissible under the other exceptions which sanction the use of such evidence to show criminal intent, guilty knowledge, or identity."

As stated in *McClain*, for a determination of whether evidence of other distinct crimes properly falls within any of the recognized exceptions, "[t]he acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. If it is logically pertinent in that it

reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime. But the dangerous tendency and misleading probative force of this class of evidence require that its admission should be subjected by the Courts to rigid scrutiny. . . . Hence, if the Court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected." *State v. Lyle*, 125 S.C. 406, 417, 118 S.E. 803, 807 (1923); *accord, State v. McClain, supra* at 177, 81 S.E. 2d at 368; *State v. Gregory*, 191 S.C. 212, 221, 4 S.E. 2d 1, 4 (1938). In borderline cases the courts scrutinize whether the probative value of the evidence outweighs the undue prejudicial effect that may result. 22A C.J.S. Criminal Law § 683 (1961).

Defendant specifically objects to the State's evidence showing that the defendant was an accessory before the fact to crimes involving breaking and entering with intent to commit larceny, these crimes being committed (1) by Devine and Watkins at the home of Tony Thompson in Myrtle Beach on 21 July 1974, (2) by Duncan, Devine, and Watkins at the Atlas Construction Company in Myrtle Beach on 30 August 1974, and (3) by Duncan, Devine, and Watkins at the home of Allison Davis in North Myrtle Beach on 19 December 1974.

[3] The admission of the testimony to which defendant objected concerning the breaking, entering, and larceny of the Atlas Construction Company cannot be regarded as prejudicial because testimony of like import was thereafter admitted without objection when Richard Mears was testifying for the State. *State v. Swift*, 290 N.C. 383, S.E. 2d (1976); *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974); *State v. Van Landingham*, 283 N.C. 589, 197 S.E. 2d 539 (1973); *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972). *See also State v. Carey*, 288 N.C. 254, 218 S.E. 2d 387 (1975); *State v. Grace*, 287 N.C. 243, 213 S.E. 2d 717 (1975). Defendant's contention that there was no requirement for him to object to the testimony of Mears on this subject because he made a "line objection" within the meaning of G.S. 1A-1, Rule 46(a)(1) (1969) is without merit. The rationale behind this rule of civil procedure is persuasive, and we might later determine that the concept of this rule is applicable in an appropriate criminal case, *e.g.*, where the trial judge sanctions the use of such con-

tinuing objections. However, this rule provides that "when there is objection to the admission of evidence involving a specified line of questioning, it shall be deemed that a like objection has been taken to any subsequent admission of evidence involving the same line of questioning." Defendant has merely taken general objections. At no time has he made an objection to a specified line of questioning so as to bring himself within the scope of the rule by asserting, for example, that the line of questions involves testimony irrelevant for stated reasons: *See generally* 1 Stansbury's N.C. Evidence, § 30 (Brandis Rev. 1973).

[4] The admission of the evidence as to the breaking, entering, and robbery of the empty safe at the Tony Thompson home and the breaking and entering with intent to steal the money in the safe at the Allison Davis home was, under the *acid test* enunciated in *State v. McClain, supra*, logically relevant for the purpose of proving the defendant's participation as an accessory before the fact to the murder of Potts in the attempted armed robbery. The defendant's participation as an accessory before the fact was a material fact in issue. In fact, this was the crucial issue going to the heart of defendant's defense.

Scrutiny of this evidence shows that it was admissible under the sixth exception to the general rule stated in *State v. McClain, supra*. Evidence of these offenses in context with other evidence showing the relationship of the defendant with the other men involved tended to establish a common plan or scheme embracing the commission of a series of larcenies so related to each other that proof of these other crimes tended to prove the crime charged and to connect the accused with its commission.

Evidence of these collateral crimes was relevant to show that, in fact, the defendant was aiding, counseling, and assisting the same group of men to serve as the instrumentalities by which the defendant profited from the larcenous scheme he concocted. The collateral crimes and the principal crime were connected by the following facts: (1) that the situs of the crimes and residences of the defendant were in close proximity (place), (2) that they occurred within a seven-month period during which the defendant and the other men were continuously in close contact (time), (3) that they were committed for the purpose of larceny (type of crime), (4) that the defendant counseled essentially the same principals, was familiar with

the targets involved, and provided the same kind of information for all of the crimes (method), (5) that essentially the same principals at the situs involved committed the crimes (principals).

A detailed analysis of the facts in this case shows that the defendant provided Watkins with the same kind of counsel and information for the Thompson and Davis crimes as he had provided to him for the Potts and Atlas Construction Company crimes. The defendant also provided Devine the same kind of counsel and information for the Thompson crime as he had provided to him for the Potts and Atlas Construction Company crimes. The evidence further indicated that Duncan was similarly informed by the defendant as to the Potts and Atlas Construction crimes. Furthermore, other evidence showing the kind of relationship that the defendant, Duncan, Devine, and Watkins had, indicated that all of them participated with the defendant in the planning of all these crimes. The defendant, Duncan, Devine, and Watkins were in close contact with each other during this seven-month period, and they were continually pursuing a common plan or scheme to commit larceny in areas in close proximity to the homes of the defendant and about which he was familiar and provided them information. On the night of the Atlas Construction Company larceny or immediately afterwards, the defendant began his discussions with Devine concerning the robbery of Mr. Potts and a Mr. Cato, who lived nearby in Pageland, South Carolina.

Other evidence showed that Devine and Watkins were principals at the situs of all the crimes. Duncan was a principal at the situs of the crimes committed against the Atlas Construction Company and Davis. Evidence of the principal crime and the collateral crimes showed that the residences of the defendant were used as places to meet for purposes of planning as well as for purposes of distributing any proceeds owed to the defendant or making a rendezvous in case of trouble.

In *State v. Grace, supra*, we held concerning that robbery case that the challenged evidence relating to three previous robberies of similar establishments by the same persons and by the use of the identical pistol in the hands of the defendant on each occasion was admissible under the sixth exception to the general rule set forth in *State v. McClain, supra*. The same principle applies in our case and renders the evidence of the collateral

offenses admissible. *See also State v. McClain*, 282 N.C. 357, 193 S.E. 2d 108 (1972); *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969); *State v. Christopher*, 258 N.C. 249, 128 S.E. 2d 667 (1962); 22A C.J.S. Criminal Law § 683 (1961). The facts in *State v. Grace, supra*, concerned a principal at the situs rather than an accessory before the fact and the evidence of similar crimes might also have been applicable on the question of identity. Still the cases are similar in that for each crime the role and identifying characteristics of the defendant remained the same and thus tended to show the defendant's role in the principal crime.

These assignments of error are overruled.

[5] Under assignments of error 41 and 42, defendant contends that the trial court erred in allowing the jury to view, and admitting into evidence, slides of the victim's wounds.

The record indicated that the trial court denied introduction into evidence of photographs but permitted the jury to view several slides on a screen in the courtroom, giving the following proper instruction:

> "These photographs, or slides, are introduced for the purpose of illustrating the Doctor's testimony, if you find that it does illustrate his testimony, and for no other purpose. They are not to be considered by you as substantive evidence, but only for the purpose of illustrating the Doctor's testimony, if you find that it does illustrate his testimony."

After this instruction was given, the doctor explained what each slide portrayed as the picture was shown on the screen. There were only 6 of these, one of the chest, one of the upper chest and face, one of the back, one of an arm, and two close-ups of the entrance wound in the chest. Each showed wounds received and appeared to be relevant upon the question of the cause of death. Under the circumstances, the fact that the slide photographs depicted a gruesome or gory spectacle does not render them inadmissible. *State v. Williams*, 289 N.C. 439, 222 S.E. 2d 242 (1976); *State v. Frazier*, 280 N.C. 181, 185 S.E. 2d 652 (1972), *death penalty vacated*, 409 U.S. 1004, 93 S.Ct. 453, 34 L.Ed. 2d 295 (1972).

Under Assignment of Error No. 46, defendant contends the court erred in denying his motion for a nonsuit.

In considering this question, the evidence must be considered in the ligst most favorable to the State, and the State must receive the benefit of every inference that can reasonably be drawn therefrom. 2 Strong, N. C. Index 2d, Criminal Law, § 104 (1967 and March, 1976, Supp.)

[6] To convict the defendant of being an accessory before the fact the State must prove (1) that the defendant counseled, procured, commanded, encouraged, or aided another to commit the offense; (2) the defendant was not present when the crime was committed; and (3) the principal committed the crime. *State v. Branch, supra; State v. Bass*, 255 N.C. 42, 120 S.E. 2d 580 (1961).

[7] Defendant does not contest the fact that the evidence shows that he was not present when the crime was committed and that the principal committed the crime. Furthermore, although defendant argues otherwise, there is plenary direct as well as circumstantial evidence showing that he counseled, procured, commanded, encouraged, or aided Devine, Locklear, and Watkins to commit the offense.

The defendant told Devine that Mr. Potts of Union County kept a substantial amount of money on him or in his possession that they could steal. He also discussed Mr. Potts and the available money with Watkins and told Watkins he would help set it up for them.

When the defendant asked Devine to trade guns, Devine told the defendant that he would be laughed at if he tried armed robbery with a .25 Colt Automatic. The defendant informed Devine, Watkins, and Duncan that he planned to have the larceny occur while the Potts dined at his house, but later he indicated to Watkins that they would have to catch Mr. Potts at his home because the defendant did not know where the money was. The defendant showed Devine, Locklear, and Watkins where the Potts' home was. He told Devine and Watkins to come back to his house after the "job." It was understood that Hunter was to get twenty-five percent of the money stolen.

The above evidence, especially as supported by the defendant's admissions as testified to by Mears and the additional evidence indicated in the statement of facts, is more than ample to overcome the motion for nonsuit. This assignment is without merit and overruled.

[8] Under Assignments of Error Nos. 47 through 54, defendant contends the trial court did not declare and explain to the jury the law arising on the evidence in the case as required by G.S. 1-180 (1969).

Defendant complains that two sentences of the court's instructions as to the elements of the crime that the State must prove in order for the jury to find him guilty failed to inform the jury that such proof must be shown by evidence establishing the enumerated elements beyond a reasonable doubt. Defendant's argument rests solely on the fact that the words "beyond a reasonable doubt" are not used in the two sentences. Defendant totally overlooks the fact that at the beginning of the charge the trial court stated that defendant "is presumed to be innocent, and the State of North Carolina must prove to you that the defendant is guilty beyond a reasonable doubt." The court then gave a complete definition of reasonable doubt. Moreover, when first listing the initial elements of the crime, the court specifically required the proof to be beyond a reasonable doubt. Similarly, at the conclusion of the charge when reciting all the elements of the crime, the court again specifically required that the proof be beyond a reasonable doubt. Finally, the court concluded, "However, if you do not so find or have a reasonable doubt as to one or more of those things, it would be your duty to return a verdict of not guilty." A charge must be read contextually, and when this is done, it is manifest that the jury understood that each element had to be proved by evidence establishing the same beyond a reasonable doubt. *State v. Branch, supra; State v. McWilliams*, 277 N.C. 680, 178 S.E. 2d 476 (1971). This contention of defendant is without merit.

[9] Defendant argues that the court erred in failing to charge the jury that in order to find the defendant guilty as an accessory before the fact to murder, the counseling of the principal by the defendant must have had an immediate causal connection to the commission of the crime by the principal. Since, in effect, this is precisely what the charge of the court required, defendant's argument is without merit. In this case, the trial court adequately stated the three essential elements that must concur in order to justify conviction of the defendant as an accessory before the fact: (1) he must have counseled, procured, commanded, or knowingly aided Billy Devine to attempt to commit armed robbery; (2) he must have not been present when the killing and attempted armed robbery occurred; and

(3) the principal, Billy Devine, murdered William Benjamin Potts while attempting to commit armed robbery. *State v. Branch, supra; State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970); *State v. Bass, supra;* G.S. 14-5 (1969). Inherent in the first element as charged by this court is the requirement that the counsel, procurement, command, or aid have a causal connection to the commission of the crime. Otherwise, there would be no real counsel, procurement, command, or aid. That the trial court in fact required an immediate causal connection is most clearly shown by the final mandate of the trial court. The court charged that the jury must find the defendant not guilty unless they found that "before the killing was committed the defendant, that is, Harry Hunter, pointed out the Potts Residence and store to Billy Devine and told Billy Devine Mr. Potts had a large sum of money and told him that he couldn't locate the money and that he would have to rob Mr. Potts when he was at home, and that the defendant was to get part of the money, and that in so doing the defendant, Harry Hunter, counseled or procured, or commanded or knowingly aided Billy Devine to attempt to commit armed robbery and that the defendant was not present at the time of the killing. . . . " Since there was no special request for the particular instruction that defendant now believes should have been given, since such an instruction was in effect given, and since the question of the causal connection herein raised was not disputed or in issue under the evidence of the case (the central issue being whether the defendant counseled, procured, or commanded the principal at all), there can be no prejudice to defendant. *See generally State v. Vinson*, 287 N.C. 326, 215 S.E. 2d 60 (1975); *State v. Cole*, 270 N.C. 382, 154 S.E. 2d 506 (1967) (discussed herein).

Defendant maintains that the charge failed to require the jury to find that the defendant and Devine entertained the common design that Devine take money from the person or presence of the deceased by violence or intimidation and that the taking was to be done with a felonious intent. The above recitation of part of the final mandate shows that the trial court in fact required the jury to find that the defendant told Devine "that he would have to rob Mr. Potts when he was at home, and that the defendant was to get part of the money." Defendant's position is without merit because the charge that he now urges should have been given was in essence given.

Defendant asserts that the court's summary of the evidence when instructing on the law was prejudicial to defendant because it ignored and excluded evidence given by the slayer, Devine, which was favorable to defendant. This evidence was the testimony of Devine that the defendant planned for the larceny to occur while he had the Potts over to his house for dinner and the fact that Devine never testified definitely whether these plans were later changed to contemplate a robbery while the Potts were at their home. In fact, the trial court included this testimony in its recapitulation of evidence although it did not underscore the testimony that was not given. Moreover, the court omitted the testimony of Watkins favorable to the State that the defendant "changed his mind, and [said] we'd have to ca[illegible]im at his home because he didn't know where the money w[illegible]." Certainly, in the absence of a request for an addition to the court's recapitulation of the evidence, defendant cannot successfully maintain that there is reversible error. *State v. Rankin*, 284 N.C. 219, 200 S.E. 2d 182 (1973); *State v. Butler*, 269 N.C. 733, 153 S.E. 2d 477 (1967). The jury was properly instructed that it was "to decide from the evidence which you have heard what the facts are." Moreover, the final mandate to the jury that they find (from circumstantial evidence impliedly) that the defendant told Devine "that he would have to rob Mr. Potts when he was at home" placed an even greater burden on the State than required by law. If the jury determined that a conspiracy existed, it clearly would have been adequate for purposes of convicting the defendant that he have told this to Watkins and that Watkins passed this information on to Devine. Defendant has failed to show any error prejudicial to him.

Defendant additionally contends that the court failed to charge the essential elements of armed robbery or an attempt to commit armed robbery so the jury could determine (1) whether Devine murdered Potts while committing or attempting to commit an armed robbery upon him and (2) whether the defendant was an accessory before the fact to such murder. He particularly emphasizes the fact that the court failed to charge that an essential element of armed robbery is "a felonious intent" and in some sufficient form explain and define the term "felonious intent."

[10] Although the court should have spelled out the essential elements of the underlying felony of attempted armed robbery

in its instructions as to what the State must prove to convict defendant of being an accessory before the fact to felony-murder, his failing to do so was not prejudicial error for the following reasons: (1) the occurrence of the attempted armed robbery by Devine, Locklear, and Watkins was not disputed and thus not in issue under the evidence in the case, (2) defendant failed to specially request instructions on the underlying felony, (3) the court did define "attempted armed robbery" as "attempted robbery with a firearm," and (4) these latter terms were essentially self-explanatory under the circumstances of this case.

Although "reasonable doubt" is not an element of a crime, it is the standard by which all elements must be proved to the jury for defendant to be found guilty. Thus, the jury's understanding of that term is as practically important as the jury's understanding of the elements of the crime. Nonetheless, the trial judge is not required to tell the jury what "reasonable doubt" is unless requested so to do. *State v. Rankin, supra; State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971), *cert. denied*, 414 U.S. 874, 94 S.Ct. 157, 38 L.Ed. 2d 114 (1973); *State v. Ingland*, 278 N.C. 42, 178 S.E. 2d 577 (1971). In part, this is because "[t]he term 'reasonable doubt' is more easily understood than defined." *State v. Edwards*, 286 N.C. 140, 146, 209 S.E. 2d 789, 793 (1974). Additionally, this is because the term is essentially self-explanatory, as is also true for the term "attempted robbery by a firearm," especially in a functional sense so far as this jury's decision is concerned because there is no real dispute as to the "felonious intent" or the actual occurrence of the attempted armed robbery and the crime charged is accessory before the fact to murder while attempting armed robbery.

In *State v. Cole, supra*, we cited with approval the following quotation from 26 Am. Jur., Homicide § 533, at 527 (1940), "[W]here, upon the undisputed facts, it clearly and conclusively appears to a moral certainty that the unlawful act complained of was the proximate cause of death, a failure so to charge, especially where there was no request so to charge, is not reversible error." Our Court held, "There being 'no evidence tending to prove that deceased's death was due to some cause other than injuries inflicted by the accused,' an instruction on proximate cause was unnecessary, and especially when there was no request therefor." *State v. Cole, supra* at 387, 388, 154 S.E. 2d at 511. This case is an example of the principle that how

much the law needs to be explained in the charge depends on the evidence presented.

State v. Sanders, 288 N.C. 285, 218 S.E. 2d 352 (1975), *cert. denied*, 423 U.S. 1091, 96 S.Ct. 886, 47 L.Ed. 2d 102 (1976), is another example of a case where the court's charge on an element of the crime might have raised serious problems but did not where the element complained about was not disputed or in issue under all the evidence. In that case, we stated that the court's charge as to the crime of willful and malicious damage to occupied personal property by means of explosives had portions that were not models of clarity. Defendant contended that the charge only required that there be injury to the person occupying the personal property and did not require that there be injury to the personal property. We determined that when the charge was read contextually, the court's reference to the crime as "damaging personal property, it being occupied at the time, by use of explosives" and its giving to the jury a sheet of paper immediately before they retired repeating the fact that this was the crime involved, prevented there being any prejudicial error. We also noted that "[a]ll of the evidence showed extensive damage to the automobile [the personal property] as well as serious injury to Stout [the person]."

In *State v. Vinson, supra*, defendant complained in a rape case that the trial judge failed to define "sexual intercourse" and thus failed to charge that rape required penetration by the male organ. The evidence disclosed two completed acts of intercourse, and there was no evidence to the contrary. Justice Huskins, speaking for our Court, said:

> "Although defendant's plea of not guilty required the State to prove penetration beyond a reasonable doubt, the defense was not grounded on lack of penetration. Under these circumstances, the term 'sexual intercourse' conveyed the idea of completed intercourse, including penetration, and the jury must have so understood." *State v. Vinson, supra* at 342, 215 S.E. 2d at 72.

As in the case of *State v. Vinson, supra*, the element in our case that was not defined, *i.e.*, the attempted armed robbery, was essentially self-explanatory and that element was not disputed and thus not in issue under all the evidence. Defendant Hunter's defense was not grounded on the absence of attempted armed robbery and the murder resulting therefrom. Rather, it

was grounded on the contention that he did not participate in the planning of the attempted armed robbery and did not counsel, procure, or command the principals Devine, Locklear, and Watkins to commit the attempted armed robbery.

In *State v. Spratt*, 265 N.C. 524, 526, 527, 144 S.E. 2d 569, 571, 572 (1965), our Court enunciated the principle that while G.S. 1-180 requires the court to "declare and explain the law arising on the evidence," the comprehensiveness and specificity "of the definition and explanation of [the essential element] 'felonious intent' required in a charge [on attempted armed robbery] depends on the facts in the particular case." In that robbery case we held that the essential element of taking with "felonious intent" was defined with sufficient comprehensiveness and specificity where the court old the jury, in effect, that before they could return a verdict of guilty, they must find that defendant attempted to take the property with "intent to rob." The Court reasoned:

> "'Rob' or 'robbery' has a well defined meaning and imports an intent to steal. [Citation omitted.] The word 'rob' was known to the common law and the expression 'intent to rob' is a sufficient definition of 'felonious intent' as applied to the robbery statute, in the absence of evidence raising an inference of a different intent or purpose." Id.

The Court therein quoted with approval the following language:

> "'[W]here the defense was an alibi and the evidence developed no issue or contention that the taking was under a bona fide claim of right or was without any intent to steal, the instructions may be upheld notwithstanding a failure to charge in specific terms with respect to an intent to steal.' 77 C.J.S., Robbery, § 49, pp. 514, 515. [Citations omitted.]" Id.

Since in our case defendant was charged with being an *accessory before the fact* to felony-murder, the need for a full definition of the underlying felony of attempted armed robbery was analogous to the need for a full definition of "felonious intent" in *State v. Spratt, supra*, where the charge was attempted armed robbery. In both cases, the jury was required to find that all the "central" elements existed, including "an attempted armed robbery" in our case and "a felonious intent" in *State*

v. Spratt, supra. In both cases, however, the court failed to define or charge as to all the inner elements of the central elements of the crimes charged. The fact that in the armed robbery case of *State v. Mundy*, 265 N.C. 528, 144 S.E. 2d 572 (1965) the court did not even charge the jury that in order to convict defendant as a principal, they must find the central element of "felonious intent" distinguishes that case from *State v. Spratt, supra*, and the present case.

If counsel for defendant had desired further elaboration on the term "armed robbery" or anything else, he should have requested it when the court concluded the instruction and asked counsel to step to the bench. We believe that the trial court has adequately instructed on all the substantial features of the case, and if the defendant desired a more detailed instruction as to any subordinate feature, then counsel should have made an appropriate request. This they failed to do. *State v. Vinson, supra; State v. Noell*, 284 N.C. 670, 202 S.E. 2d 750 (1974); *State v. Gordon*, 224 N.C. 304, 30 S.E. 2d 43 (1944); *State v. Hendricks*, 207 N.C. 873, 178 S.E. 557 (1935); *State v. O'Neal*, 187 N.C. 22, 120 S.E. 817 (1924).

For the aforementioned reasons, defendant's assigments of error as to the charge are overruled.

Because of the serious nature of the crime for which defendant has been convicted, we have examined all the assignments of error in the record proper and find no prejudical error.

Defendant was "entitled to a fair trial but not a perfect one." *Lutwak v. United States*, 344 U.S. 604, 619, 73 S.Ct. 481, 490, 97 L.Ed. 593, 605 (1953); *accord, State v. Cogdale*, 22[illegible] N.C. 59, 40 S.E. 2d 467 (1946); *State v. Beal*, 199 N.C. 278, 154 S.E. 604 (1930). A fair trial the defendant has had and we find

No error.

Justice EXUM concurs in result.

Justice LAKE dissenting.

The defendant appeals from a sentence to imprisonment for life for the crime of being an accessory before the fact to a murder committed in the perpetration of an attempt to commit

robbery with a firearm. The jury found him guilty of that offense. The evidence fully supports the verdict. There was no prejudicial error in the admission of that evidence. There was, however, error in the failure of the trial judge to instruct the jury as to all the elements of the offense with which the defendant was charged and of which he was convicted. This the trial judge was required to do by G.S. 1-180.

The judge instructed the jury:

"Now, the defendant was originally charged with murder in the first degree. However, you will not be called upon to find the guilt or innocence of the defendant on this charge, but you will be called upon to find the guilt or innocence of the defendant on a lesser included offense, that is, accessory before the fact of murder in the perpetration of attempt to commit robbery with a firearm, commonly called armed robbery, *the meaning of which I will explain to you later on.* (Emphasis added.)

* * *

"Now, lady and gentlemen, as I said, the defendant has been accused of accessory before the fact of murder in the perpetration of an attempt to commit robbery with a firearm, which in common language is armed robbery.

"Now, I charge that for you to find the defendant guilty as an accessory before the fact of murder in the perpetration of attempted robbery with a firearm, the State must prove the following things beyond a reasonable doubt. First, the State must prove and prove beyond a reasonable doubt that murder in the perpetration of attempted armed robbery was committed by Billy Devine. Now, in order to find that Billy Devine committed murder in the perpetration of an armed robbery, the State must prove 2 things beyond a reasonable doubt, that is, that Billy Devine shot William B. Potts while committing or attempting to commit armed robbery, and, second, that the shooting proximately caused William Benjamin Potts' death.

* * *

"So I repeat, in order to find the defendant guilty of this charge, you first must find that murder in the perpetration of attempted robbery was committed by Billy Devine, and in order to find that you must find Billy

Devine shot Mr. Potts while committing or attempting to commit armed robbery, and that the shooting proximately caused Mr. Potts' death.

"Coming back to what the State must prove, again, that before the crime was committed, the defendant, that is, Harry Hunter, counseled, procured, commanded or knowingly aided Billy Devine to commit or attempt to commit armed robbery. And finally, the State must prove that the defendant was not present when the killing of William Benjamin Potts occurred.

* * *

"Therefore, lady and gentlemen, I charge if you find from the evidence beyond a reasonable doubt that on or about February 7, 1975, Billy Devine committed murder in the perpetration of attempt to commit robbery, that is, that Billy Devine shot William Benjamin Potts while attempting to commit armed robbery and the shooting proximately caused William Benjamin Potts' death and that before the killing was committed the defendant, that is, Harry Hunter, pointed out the Potts residence and store to Billy Devine and told Billy Devine Mr. Potts had a large sum of money and told him that he couldn't locate the money and that he would have to rob Mr. Potts when he was at home, and that the defendant was to get part of the money, and that in so doing the defendant, Harry Hunter, counseled or procured or commanded or knowingly aided Billy Devine to attempt to commit armed robbery and that the defendant was not present at the time of the killing, it would be your duty to return a verdict of guilty of accessory before the fact of murder."

In a charge otherwise free from error the trial judge inadvertently failed to instruct the jury as to the elements of the offense of robbery, the underlying felony which made the killing of Mr. Potts murder.

Since robbery (or attempt to rob) is an essential element of the offense for which the defendant was put on trial, G.S. 1-180 required the judge to instruct the jury as to the elements of robbery. We may not lawfully assume that this was nonprejudicial error on the theory that everyone knows what robbery is. No such assumption may lawfully be made when a defendant is charged with the crime of robbery itself. See:

State v. Logner, 269 N.C. 550, 551, 153 S.E. 2d 63 (1967); *State v. Fulford*, 124 N.C. 798, 32 S.E. 337 (1899). Similarly, no such assumption may lawfully be made when he is charged with a crime of which robbery is an essential element.

"A correct charge is a fundamental right of every accused." *State v. Orr*, 260 N.C. 177, 181, 132 S.E. 2d 334 (1963). As Justice Barnhill, later Chief Justice, said in *State v. Friddle*, 223 N.C. 258, 261, 25 S.E. 2d 751 (1943), "The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and on the other, and to bring into view the relation of the particular evidence adduced to the particular issue involved." G.S. 1-180 confers upon litigants, including defendants charged with crime, a substantial legal right to have the jury instructed as to the law upon all substantial features of the case. *State v. Everette*, 284 N.C. 81, 199 S.E. 2d 462 (1973); *State v. Brady*, 236 N.C. 295, 72 S.E. 2d 675 (1952); *State v. Ardrey*, 232 N.C. 721, 62 S.E. 2d 53 (1950). The judge must charge the jury as to what constitutes the essential elements of the offense for which the defendant is brought to trial. *State v. Hairr*, 244 N.C. 506, 94 S.E. 2d 472 (1956).

To convict the defendant of the offense of being an accessory before the fact to a murder committed in the perpetration of an attempt to commit robbery, the jury would have to find that the killing was committed in the course of an attempt to commit robbery. To so find, the jury would have to know what constitutes robbery. The instructions given the jury do not contain any definition of that offense.

APPENDIX B

[Constitutional Provisions, Statutes, and Canons of Ethics Involved]

Set forth below are the pertinent parts of the constitutional provisions, statutes, and canons of ethics involved:

1. Article VI of the Constitution of the United States: "This Constitution * * * shall be the supreme law of the land; and the Judges in every state shall be bound thereby; any thing in the Constitution and laws of any state to the contrary notwithstanding."

2a. Sixth Amendment to the Constitution of the United States: "In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense."

2b. Section 1 of the Fourteenth Amendment to the Constitution of the United States: No state "shall * * * deprive any person of life, liberty, or property without due process of law."

3. Section 1-255 of the Code of Laws of South Carolina of 1962: "The Solicitors may defend any persons brought to trial before any criminal courts of this state when their duties shall not require them to prosecute such persons and their assistance shall not be required against such persons by the Governor or Attorney General."

4a. Section 14-5 of the General Statutes of North Carolina: "If any person shall counsel, procure or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any statute, the person so counseling, procuring or commanding shall be guilty of a felony, and may be indicted and convicted, either as an accessory before the fact to the principal felon, or after the conviction of the principal felon; or he may be indicted and convicted of a

substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished."

4b. Section 14-6 of the General Statutes of North Carolina: "Any person who shall be convicted as an accessory before the fact in either of the crimes of murder, arson, burglary, or rape shall be imprisoned for life in the State's Prison."

5. Section 14-17 of the General Statutes of North Carolina: "A murder * * * which shall be committed in the perpetration or attempt to perpetrate any * * * robbery * * * shall be deemed to be murder in the first degree and shall be punished with death."

6. Section 14-87 of the General Statutes of North Carolina: "Any person * * * who, having in possession or with the use or threatened use of any firearms or other dangerous weapon * * * whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another * * * or who aids or abets any such person * * * in the commission of such crime, shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not less than five nor more than thirty years."

7. Section 84-2 of the General Statutes of North Carolina: "No * * * full-time district attorney, (or) full-time assistant district attorney * * * shall practice law. Persons violating this provision shall be guilty of a misdemeanor and fined not less than two hundred dollars ($200.00).

Note: Manifestly this statute applies only to full-time district attorneys or assistant district attorneys holding office in North Carolina.

8. Section 84-4.1 of the General Statutes of North Carolina; "Any attorney regularly admitted to practice in the courts of record of another state and in good standing therein, having been retained as attorney for any party to a legal proceeding, civil or criminal, pending in the General Court of Justice of North Carolina, or the North Carolina Utilities Commission may, on motion, be admitted to practice in the General Court of Justice or North Carolina Utilities Commission for the sole purpose of appearing for his client in said litigation, but only upon compliance with the following conditions precedent:

"(1) He shall set forth in his motion his full name, post-office address and status as a practicing attorney in such other state.

"(2) He shall attach to his motion a statement, signed by his client, in which the client sets forth his post-office address and declares that he has retained the attorney to represent him in such proceeding.

"(3) He shall attach to his motion a statement that unless permitted to withdraw sooner by order of the court, he will continue to represent his client in such proceeding until the final determination thereof, and that with reference to all matters incident to such proceeding, he agrees that he shall be subject to the orders and amenable to the disciplinary action and the civil jurisdiction of the General Court of Justice and the North Carolina State Bar in all respects as if he were a regularly admitted and licensed member of the Bar of North Carolina in good standing.

"(4) He shall attach to his motion a statement to the effect that the state in which he is regularly admitted to practice grants like privileges to members of the Bar of North Carolina in good standing.

"(5) He shall attach to his motion a statement to the effect that he has associated and has personally appearing with him in such proceeding an attorney who is a resident of this State and is duly and legally admitted to practice in the General Court of Justice of North Carolina, upon whom service may be had in all matters connected with such legal proceedings, or any disciplinary matter, with the same effect as it personally made on such foreign attorney within this State.

"(6) Compliance with the foregoing requirements shall not deprive the court of the discretionary power to allow or reject the application."

9. Canon of Ethics No. 46C of the North Carolina State Bar: "It shall be deemed unethical and unprofessional for any attorney who is, or has been, a prosecuting attorney * * * in any court inferior to the Supreme Court, * * * to accept professional employment in any matter of a civil or criminal nature, growing out of any matter or thing which is, or has been in any way connected with the office of such prosecuting officer * * * during his incumbency."

Note: Manifestly this statute, which has been suspended by Section 84-2 of the North Carolina General Statutes and Canon No. 9 of the Code of Professional Responsibility of the North Carolina State Bar, applied only to prosecuting attorneys in North Carolina courts inferior to the North Carolina Supreme Court.

10. Canon of Ethics No. 9 of the Code of Professional Responsibility of the North Carolina State Bar: "A lawyer should avoid even the appearance of professional impropriety * * * (1)R9-101(B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

Note: Manifestly this statute is applicable to North Carolina only.

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-761

HARRY HUNTER,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

RESPONSE OF THE STATE OF NORTH CAROLINA TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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IN THE

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No.

HARRY HUNTER,

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STATE OF NORTH CAROLINA,

Respondent.

RESPONSE OF THE STATE OF NORTH CAROLINA TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

The Respondent respectfully prays that the Petitioner's PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA seeking review of a decision of the Supreme Court of the State of North Carolina entered on September 1, 1976, be denied.

CITATION TO OPINION BELOW

The Petitioner was tried on two separate indictments charging him with first degree murder and with armed robbery or attempted robbery. The trial court submitted to the jury only the issue of the defendant's guilt as to being an accessory before the fact to a murder committed in the perpetration of an attempt to commit robbery with a firearm. The jury returned a verdict of guilty, and a sentence of life imprisonment

was imposed. The Supreme Court of North Carolina affirmed the judgment. 290 N.C. 556.

JURISDICTION

The Respondent does not object to the statement of jurisdiction in the Petitioner's Petition for a Writ of Certiorari to the Supreme Court of North Carolina.

QUESTION PRESENTED

DOES A DEFENDANT WHO IS BEING TRIED IN A CRIMINAL ACTION IN ONE STATE, THOUGH HE BE A RESIDENT OF ANOTHER STATE, HAVE AN AUTOMATIC CONSTITUTIONAL RIGHT TO BE REPRESENTED IN THE CRIMINAL ACTION BY AN ATTORNEY FROM HIS STATE OF RESIDENCE, EVEN THOUGH THE DEFENDANT IS ALREADY REPRESENTED BY ONE ATTORNEY FROM HIS STATE OF RESIDENCE AS WELL AS AN ATTORNEY FROM THE STATE IN WHICH THE CRIMINAL ACTION IS BEING CONDUCTED?

CONSTITUTIONAL PROVISIONS, STATUTES, AND CANONS OF ETHICS INVOLVED

The Respondent does not object to any of the above provisions which are included in the Petitioner's Petition for a Writ of Certiorari to the Supreme Court of North Carolina.

STATEMENT OF CASE

This was a criminal action in which the defendant, Harry Hunter, was indicted on two separate indictments of first degree murder and with armed robbery or attempted robbery of the murder victim. The case was tried before the Honorable Julius A. Rousseau, Superior Court Judge, at the August 18, 1975 Criminal Session of Union County Superior Court.

The trial court submitted to the jury only the question of guilt of the defendant as an accessory before the fact of

murder, and from a verdict of guilty, a sentence of life imprisonment was imposed. The Supreme Court of North Carolina affirmed the judgment below on September 1, 1976.

STATEMENT OF FACTS

The Respondent adopts as its own, as if fully set out herein, the facts as stated by the North Carolina Supreme Court in its opinion in *State v. Hunter*, 290 N.C. 556 (1976).

Inasmuch as the primary reason for the Petitioner's Petition for a Writ of Certiorari to the Supreme Court of North Carolina deals with the question of the Petitioner's legal representation, and since the facts surrounding that representation are not set out in the North Carolina Supreme Court's statement of facts, the Respondent herein sets out those facts in addition to the actual facts of the case as enunciated by the North Carolina Supreme Court.

On May 5, 1975, Mr. James M. Long, an attorney from South Carolina, apparently was retained by the Petitioner, after having been told by the District Attorney of Union County that a bill of indictment had been returned against the Petitioner in Union County. Mr. Ralph Stroman, an attorney in South Carolina who normally handles the Petitioner's business affairs, had also been retained by the Petitioner, some days prior to May 5, 1975. Mr. James Griffin, an attorney in Union County, North Carolina, was retained by the Petitioner on June 1, 1975.

On August 18, 1975, which was the date set for the trial of the Petitioner, the Petitioner made a motion to admit as one of his counsel James M. Long. Since the question of the admission of Mr. Long was objected to by the District Attorney, an extensive inquiry was made by the trial court into the matter and it was determined that Mr. Long, at that time, was the chief prosecuting attorney for the Fifteenth Judicial Circuit in South Carolina, which included Horry County, where Myrtle Beach is located, and where the Petitioner himself lived. At this time, the law of South Carolina, as provided in Section 1-255 of the Code of Laws of South Carolina stated as follows:

"The solicitors may defend any persons brought to trial before any criminal courts of the state when their duty shall not require them to prosecute such persons and their assistance shall not be required against such persons by the Governor or Attorney General."

During the inquiry into this question, the District Attorney told the trial court that Mr. Long had originally been requested to assist him in the arrest of the Petitioner but that no help was forthcoming and that Mr. Long in fact assisted the Petitioner in making bond on the murder charge.

Subsequent to the retaining of Mr. Long as counsel for the Petitioner, additional criminal charges were brought against the Petitioner in Mr. Long's judicial district. The Attorney General of South Carolina, responding to this situation, filed a writ in the Supreme Court of South Carolina to restrain Mr. Long from participating in South Carolina in any of the cases involving the Petitioner. However, after Mr. Long explained that his assistants were handling the prosecution in South Carolina and that he was completely removed from that prosecution, the matter was withdrawn by the Attorney General. It should be pointed out that at the time of the motion to allow Mr. Long to appear in the criminal action in Union County, North Carolina, the question of the prosecution by Mr. Long or his assistants in South Carolina was still before the South Carolina Supreme Court.

Upon the conclusion of the inquiry into the matter of the Petitioner's legal representation, the trial court issued the following findings of fact:

"That a bill of indictment was issued against the defendant Harry Hunter on or about May 5, 1975; that Mr. James E. Griffin of the Union County Bar was employed by Mr. Hunter approximately June 1, 1975; that prior to that time the defendant had employed Mr. James M. Long, and prior to that time had employed Mr. Stroman; that Mr. J. M. Long is the duly elected solicitor or prosecuting attorney for the Fifteenth Judicial Circuit in South Carolina, consisting of

Horry and Georgetown Counties; that since the issuance of the bill of indictment from Union County the defendant has been indicted in the Fifteenth Judicial Circuit of South Carolina for a felony; that Mr. Long has obtained permission from the proper authorities in South Carolina to not prosecute the defendant in South Carolina, but to leave it to his assistants and the Attorney General's Office of the State of South Carolina."

Based on the findings of fact as herein set out, the trial court concluded that:

"The Court in its discretion denies the written motion of Mr. Long to appear in the trial of this case in Union County; there being no objection to Mr. Stroman appearing, the Court will allow him to appear in behalf of the defendant."

Mr. James Griffin, who was retained by the Petitioner as counsel in this case on June 1, 1975, was told on or about that date by the District Attorney of Union County that an objection would be made to the appearance of Mr. Long as legal counsel for the Petitioner. However, subsequent to the denial of Mr. Long's written motion by the trial court to appear as counsel in this case, Mr. Griffin moved that the trial of the Petitioner be continued "to allow Mr. Hunter to obtain other counsel if he so desires." No further statement or argument in the Petitioner's behalf was made at this time for the continuance. The motion for the continuance was denied by the trial court

ARGUMENT

DOES A DEFENDANT WHO IS BEING TRIED IN A CRIMINAL ACTION IN ONE STATE, THOUGH HE BE A RESIDENT OF ANOTHER STATE, HAVE AN AUTOMATIC CONSTITUTIONAL RIGHT TO BE REPRESENTED IN THE CRIMINAL ACTION BY AN ATTORNEY FROM HIS STATE OF RESIDENCE, EVEN THOUGH THE

DEFENDANT IS ALREADY REPRESENTED BY ONE ATTORNEY FROM HIS STATE OF RESIDENCE AS WELL AS AN ATTORNEY FROM THE STATE IN WHICH THE CRIMINAL ACTION IS BEING CONDUCTED?

The Petitioner argues that his constitutional right to counsel was violated by the North Carolina Superior Court when it denied the written motion of Mr. James Long, a South Carolina attorney employed by the Petitioner, to legally represent him against criminal charges brought in Union County, North Carolina. The only case which the Petitioner has cited in support of his argument is *United States v. Bergama, et al*, 154 F.2d. 31 (1946). None of the other cases which are cited by the Petitioner involve in any way the exclusion of an out-of-state attorney. In *United States v. Bergama, supra*, the Circuit Court of Appeals for the Third Circuit held that it was error for a Federal District Court to exclude from the trial, which was taking place in Pennsylvania, New Jersey attorneys who were chosen and retained by a New Jersey resident. However, in *United States v. Bergamo, supra*, it was suggested by the Court that a primary reason for its decision was that local counsel did not have sufficient time to prepare an adequate defense for the defendants, an argument which was made by the local counsel to the Court when it decided not to put on any active defense for the defendants. It is also apparent from a careful reading of *United States v. Bergamo, supra*, that the local Pennsylvania counsel, employed by the defendants, was to be in the nature of associate counsel and not lead counsel. Lead counsel was to come from New Jersey, the resident state of the defendants. Also, the trial court announced that only Pennsylvania counsel from that district would be allowed to practice before the court.

United States v Bergamo, supra, is clearly distinguishable on its facts from the present case. In this case, it is apparent that Mr. James Griffin, the North Carolina attorney, was to act as lead counsel and not as associate counsel. It is equally clear that in this case, unlike *United States v. Bergamo, supra*, the Petitioner was in fact allowed to have South Carolina legal representation. There was no attempt by the trial court to arbitrarily deny to the petitioner legal counsel from another state. No blanket suggestion was made by the North Carolina

trial court that all legal counsel, outside North Carolina, would be excluded. On the contrary, the North Carolina trial court specifically allowed legal representation from outside North Carolina.

It is equally important to note that trial counsel in this case had sufficient time to prepare a defense for the Petitioner. The South Carolina counsel who was retained in this case was employed by the Petitioner prior to May 5, 1975. The North Carolina counsel was employed on or about June 1, 1975. The trial of the Petitioner did not begin until August 18, 1975, some two and one-half months after North Carolina counsel had first been retained.

In addition, after the exhaustive inquiry by the North Carolina trial court into the merits of allowing Mr. James Long, the South Carolina attorney, into the case, the trial court made findings of fact to support his discretionary ruling to exclude Mr. Long from the trial of the case. As noted by the North Carolina Supreme Court's opinion, Subsection 6 of G.S. 84-4.1 provides that compliance with the requirements that must be met by out-of-state attorneys in North Carolina shall not deprive the trial court of the discretionary power to allow or reject the application. That such allowance of outside counsel has long been discretionary in North Carolina is made clear by the Supreme Court decision of *Manning v. Railroad*, 122 NC 824, 28 SE 963 (1898) wherein the Court stated as follows:

> "The appearance of such counsel is a matter of courtesy in each and every case, and on motion in each case, and only for the occasion on which it is allowed. The statute forbids the courts from allowing non-resident counsel (when citizens of another state and not holding license from this court) from practicing habitually in our courts, and they cannot acquire the right to do so."

The North Carolina Supreme Court, in *State v. Hunter, supra*, perhaps best cited the prevailing and established law throughout the United States with respect to this question of the right to practice law by an out-of-State attorney in the following paragraph which is quoted in its entirety:

> "It is well settled that an out-of-state attorney has no absolute right to practice law in another forum. It is permissive and subject to the sound discretion of the Court. *Thomas v. Cassidy*, 249 F. 2d 91 (4th Cir. 1957), *cert. denied*, 355 U.S. 958, 78 S.Ct. 544, 2 L.Ed. 2d 533 (1958); *Cooper v. Hutchinson*, 184 F.2d 119 (3d Cir. 1950); *Parker v. Parker*, 97 So.2d 136 (Fla. App. 1957); *State v. Kavanaugh*, 52 N.J. 7, 243, A.2d 225 (1968), *cert. denied*, 393 U.S. 924, 89 S.Ct. 254, 21 L.Ed.2d 259 (1968); *Manning v. Railroad*, 122 N.C. 824, 28 S.E. 963 (1898); *Smith v Brock*, 532 P.2d 843 (Okl. 1975); 7 Am Jr. 2d, Attorneys at Law, §10 (1963 and Cum. Supp. June, 1976); 7 C.J.S. Attorney and Client §15(b) (1937 and Cum Supp. 1976)."

In addition, the Supreme Court of Oklahoma has recently examined this same contention in a similar situation in *Smith v. Brock*, 532 P.2d 843 (1975). In this action, petitioners (defendant and his out-of-state attorney) requested the Oklahoma Supreme Court to assume original jurisdiction and issue a writ of *mandamus* compelling the trial court to admit the attorney *pro hac vice* to defend petitioner.

Pursuant to constitutional authority, the Supreme Court of Oklahoma promulgates rules governing the practice of law in that State, Sec. 5 of Art. 2 in Title 5, OS 1971, Ch. 1, App. 1 contains a provision analogous to G.S. 84-4.1. In order for attorneys from other jurisdictions to practice in Oklahoma, certain express conditions must be met. This case concerned a subsection regarding foreign attorneys who have willfully engaged in disorderly or disruptive tactics–petitioner had been refused admission to practice in the trial court based on previous convictions both in Oklahoma and Texas for contempt of court.

The Oklahoma court examined cases in several other jurisdictions that construed similar questions. In Florida, an appellate court has held, "The right of an attorney of another state to practice is permissive and subject to the sound discretion of the Court to which he applied for the permission."

Parker v. Parker, 97 So.2d 136, 137 (1957). In *State v. Kavanaugh*, 52 NJ 7, 243 A2d 225 (1968), the Supreme Court of New Jersey rejected Mr. F. Lee Bailey's contention that there is a constitutional right to select an attorney who is not a member of the New Jersey Bar. This decision was bottomed on *Thomas v. Cassidy*, 249 F2d 91 (4th Cir. 1957); *Cert. den, Fitzgerald v. Cassidy*, 355 US 958, 78 SCt. 544, 2 L.Ed. 2d 533 (1958), and the following language from that case is cited with approval:

> "'It is well settled that permission to a nonresident attorney, who has not been admitted to practice in a court, to appear *pro hac vice* in a case there pending is not a right but a privilege, the granting of which is a matter of grace resting in the sound discretion of the presiding judge. 5 Am Jur. p.572; *Manning v. Roanoke & T.R.Co.*, 122 NC 824, 28 SE 963; *Youmans v. Hannah*, 35 ND 479, 160 NW 705, 161 NW 797, Ann.Cas. 1917 E. 263; Note 24 LRA, NS, 754." *Smith v. Brock*, *supra*, at 848.

To the same effect is *State v. Ross*, 36 Ohio App. 185, 304 NE2d 396 (1971).

After establishing that the admission of an out-of-sate lawyer rests within the sound discretion of the trial court, the Oklahoma Supreme Court then considered the question of whether there is a constitutional right of an accused to select out-of-state counsel of his own choice, the very issue presented here. The Oklahoma Supreme Court's analysis quotes with approval the following statement made in *Cooper, et al v. Hutchinson*, 184 F2d 119 (3rd Cir. 1950):

> "'The narrower question here is the extent to which an accused persons choice of counsel is a constitutional right. The argument insists that there is a constitutional right, at least in a capital case, to whatever counsel an accused person pleases to have. *If that counsel is not a member of the Bar of the state where the prosecution is being conducted, still, the argument runs, the accused may effectively choose him just as freely*

as he could choose a lawyer admitted to practice locally. The person chosen by the accused may then insist upon conducting the defense in the local courts. *Control by the states over the persons who may be licensed to practice law in their courts would thus be greatly diminished in every capital criminal prosecution where the accused desires counsel from somewhere else.*

The length to which this argument takes one is startling. It has always been thought that the license to practice law is limited, except as a matter of grace, to persons who had fulfilled the local requirements for practice. ....' (*Emphasis added.*)" *Smith v. Brock*, supra, at 850.

Finally, the United States Court of Appeals for the Sixth Circuit in *Ross v. Reda, Judge*, 510 F.2d. 1172, *cert. denied*, 75-63 (October 14, 1975), issued a per curiam decision affirming the denial of the application of the petitioner for a writ of habeas corpus, wherein it was contended that the refusal of the Ohio state trial court to admit out-of-state counsel to represent the petitioner at his trial in that court deprived the petitioner of his Sixth amendment right to counsel. In making its determination, the Court of Appeals stated as follows:

"While the Sixth Amendment right '(i)n all criminal prosecutions' to the 'assistance of counsel' implies a degree of freedom to be represented by counsel of defendant's choice, this guarantee does not grant the unconditional right to representation in a state court by a particular out-of-state attorney. To the contrary, in *Thomas v. Cassidy*, 249 F.2d 91, 92 (4th Cir. 1957), *cert. denied*, 355 U.S. 958 (1958), the Court said:

"'(I)t is well settled that permission to a non-resident attorney, who has not been admitted to practice in a court to appear *pro hac vice* in a case there pending is not a right by a privilege, the granting of which is a matter of grace resting in the sound discretion of the presiding judge.'

"Moreover, the Sixth Amendment claim is modified significantly by the actual availability and presence of other competent counsel.

"...The prerogative of a trial judge to exclude out-of-state counsel, like the right of a defendant to be represented by the counsel of his choice, is not an absolute right. In the present case the state trial court denied the application of the out-of-state attorney for admission *pro hac vice* on the ground that he affirmatively refused to limit his out-of-court statements about the case during its pendency. In his order the trial judge noted, among other reasons for denying the application, the following:

"'(B)ut there is no question in the mind of this Court that the applicant's conduct was unprofessional and in violation of the Code of Professional Responsibility, particularly Canon 7, EC 7-36, DR 7-107 (A) (B); Canon 8, DR 8-102 (B); Canon 9, EC 9-1, 2, 6.'

"The Ohio Court of Appeals held that the refusal of the out-of-state counsel to limit his out-of-court statements about the case during its pendency constituted a potential violation of Canon 7 of the Ohio Canons of Ethics.

"We view this justification as sufficient to warrant the legitimate exercise of the state's power to 'require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar ...' *Schware v. Board of Bar Examiners*, 353 US 232, 239 (1957). The states necessarily maintain this power over the admission of attorneys as an 'incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied.' *Cohen v. Hurley*, 366 US 117, 123-24 (1961); *State v. Kavenaugh*, 52 NJ 7, 243 A.2d 225, *cert denied*, 393 US 924 (1968)."

It is clear from the decision of *Ross v. Reda, Judge, Supra, Thomas v. Cassidy, supra,* and *Cooper v. Hutchinson, supra*, that at least three circuit courts have ruled on the precise question presented here, and all three circuit courts have ruled the same way. There is no conflict of opinion at this time among the various circuit courts of appeals as to the question of out-of-state legal representation in a criminal trial under facts imilar to what are present here.

Petitioner makes the argument that the decision of the North Carolina Supreme Court is incompatible with previous decisions of the United States Supreme Court. However, as the Petitioner points out, there are no present decisions of the United States Supreme Court specifically relating to the exclusion of an attorney such as was done in the instant case. There are, as have been mentioned above, several decisions throughout the United States construing such a situation and all of them have resolved the matter in favor of the position taken by the Respondent. The decision of the North Carolina Supreme Court is in no way incompatible with previous decisions of the United States Supreme Court and in no way violates the Petitioner's right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution.

In the decision of the United States Court of Appeals in *Ross v. Reda, Judge, supra*, it was stated that a trial judge did have the discretion to exclude out-of-state counsel, provided of course that there was some legitimate reason for so doing. In the instant case, the attorney from South Carolina who was excluded by the North Carolina trial court refused to assist the Union County District Attorney in originally apprehending the Petitioner and in fact assisted the Petitioner in making bond on the murder charge Secondly, the South Carolina Supreme Court, at the time the motion was made to allow Mr. Long to be associated as counsel in the North Carolina trial, had not yet made its final determination as to how to proceed with certain charges which were brought against the Petitioner in South Carolina in the very geographical location and judicial circuit wherein Mr. Long was the chief prosecutor. Because of these factual situations, the North Carolina trial court, in its legitimate discretion, exercised its prerogative to deny Mr. Long, the South Carolina attorney, from actively participating in the North Carolina trial. In so doing, the North Carolina

trial court sought to insure compliance with the Code of Professional Responsibility of the North Carolina State Bar wherein Canon 9 states as follows:

> "A lawyer should avoid even the appearance of professional impropriety."

In addition, it should finally be pointed out that the North Carolina trial court did not disallow to the Petitioner the right to have counsel from outside North Carolina. Indeed, the Petitioner specifically was allowed to have a South Carolina attorney representing him at the trial as well as a North Carolina attorney, who was to act as lead counsel.

The Petitioner argues that the trial court committed error by dening to him a continuance of the August 18, 1975, trial in order to allow him the opportunity to select other outside counsel. However, it is noted that counsel for the Petitioner did not argue his Motion for Continuance. The Petitioner now states that he did not do so because he was completly convinced that he would prevail However, the fact remains that no argument was made whatsoever to the trial court in support of the Motion for Continuance. No showing was made that the Petitioner desired to have other counsel from South Carolina.

Finally, the District Attorney of Union County specifically instructed the North Carolina counsel for the Petitioner two and one-half months prior to the trial date that he would oppose allowing Mr. Long to participate actively in the trial. While Respondent recognizes that a decision of the District Attorney is not the final factor in a question such as this, and that only the trial court itself can make that conclusion, it did nevertheless put the Petitioner and his counsel on active notice that there was a serious possibility that Mr. Long might not be allowed to participate in the trial since the District Attorney would actively oppose that. The Petitioner and his counsel had two and one-half months to prepare an argument in support of his Motion for Continuance or in any event to seek other counsel should that necessity arise. There is no indication that any such attempt was made. There is no indication that had a continuance been granted, that Petitioner would have ever sought any additional outside counsel.

In conclusion, it is apparent that the decision of the North Carolina Supreme Court in this matter is correct and proper and completely in accord with prevailing law throughout the United States, both in State and Federal Courts. The Petitioner was not denied his right to counsel and was not denied his right to a fair trial. The Petitioner was afforded both North Carolina counsel and counsel from his resident state. The action of the North Carolina trial court in dening to Petitioner the right to have Mr. Long represent him in the criminal trial in North Carolina was completely within the legitimate discretion of the trial court and was so properly exercised. There was no error committed by the trial court in this regard and none was shown on appeal. For that reason, the North Carolina Supreme Court acted correctly in affirming the judgment of the North Carolina trial court in this regard.

CONCLUSION

Respondent urges that the decision of the North Carolina Supreme Court affirming the action of the North Carolina Superior Court was correct and that no constitutional right to counsel of the Petitioner was denied. Therefore, the Petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify ~~that I am admitted to practice law before the Supreme Court of the United States~~; that I have served copies of the within RESPONSE OF THE STATE OF NORTH CAROLINA TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA by depositing three copies of same in the United States Mail at Raleigh, North Carolina addressed to:

The Honorable Sam J. Ervin, Jr.
Counsel for the Petitioner
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first class postage prepaid.

This the 14th day of January, 1977.

James Blackburn
James L. Blackburn
Special Deputy Attorney General

Counsel for the State of North Carolina, Respondent